No. 89-275-CFX
Status: GRANTED

Title: Cooter & Gell, Petitioner
v.
Hartmarx Corporation, et al.

Docketed:
August 16, 1989

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Cooter,Dale A., Saltzburg,Stephen

Counsel for respondent: Favrettp,Richard J.

Entry	Date	Note	Proceedings and Orders
1	Aug 16 1989	G	Petition for writ of certiorari filed.
2	Sep 18 1989		Brief of respondents Hartmarx Corp., et al. in opposition filed.
3	Sep 20 1989		DISTRIBUTED. October 6, 1989
5	Oct 10 1989		REDISTRIBUTED. October 13, 1989
6	Oct 16 1989		Petition GRANTED. limited to Questions 1, 3 and 6 presented by the petition.
			**********
8	Nov 30 1989		Brief amicus curiae of Chicago Council of Lawyers filed.
9	Nov 30 1989		Brief amicus curiae of Association of Trial Lawyers of America filed.
10	Nov 30 1989		Joint appendix filed.
11	Nov 30 1989		Brief of petitioner Cooter & Gell filed.
12	Nov 30 1989		Brief amicus curiae of Public Citizen filed.
13	Nov 30 1989		Brief amicus curiae of Plaintiff Employment Lawyers Assn. filed.
15	Dec 7 1989		Order extending time to file brief of respondent on the merits until January 8, 1990.
16	Jan 5 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 20, 1990. (2ND CASE)
17	Jan 8 1990		Brief of respondents Hartmarx Corp., et al. filed.
18	Jan 8 1990		Record filed.
		*	Certified copy of original record and proceedings received.
19	Jan 8 1990		Brief amicus curiae of Legal Affairs Council filed.
21	Jan 16 1990	G	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
20	Jan 17 1990		CIRCULATED.
22	Jan 22 1990		Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
23	Feb 7 1990	X	Reply brief of petitioner Cooter and Gell filed.
24	Feb 20 1990		ARGUED.

Supreme Court, U.S.
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89-275

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether jurisdiction exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i).

2. What is the standard to be applied when deciding the reasonableness of a plaintiff's prefiling inquiry in an antitrust case.

3. Whether review of Rule 11 sanctions under an "abuse of discretion" standard is appropriate.

4. Whether the District Court abused its discretion in imposing Rule 11 sanctions on Cooter & Gell.

5. Whether the amount of the sanctions awarded was so excessive as to constitute an abuse of discretion.

6. Whether a Court of Appeals can automatically impose Rule 11 sanctions for an appeal upon affirmance of a Rule 11 award.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption to the Petition, Danik, Inc. was a Plaintiff in the District Court. The Court of Appeals dismissed Danik's appeal for failure to prosecute. Danik is now bankrupt.

Respondents include Hart, Schaffner & Marx and Hickey-Freeman Co., Inc., wholly-owned corporate subsidiaries of Hartmarx Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No.

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Cooter & Gell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. *infra*, 1a-17a) is reported at 875 F.2d 890 (D.C. Cir. 1989). The ruling of the United States District Court for the District of Columbia granting sanctions (App. *infra*, 18a-31a) is reported at 120 F.R.D. 439 (D.D.C. 1988).

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondent Hartmarx Corp., et al., filed for sanctions against Petitioner Cooter & Gell pursuant to Fed. R. Civ. P. 11 which provides in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading . . .; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the expenses reasonably incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee.

Prior to a ruling on that Motion, Danik, Inc. voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(i) which provides:

> [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . .

STATEMENT OF THE CASE

Petitioner Cooter & Gell is a partnership engaged in the practice of law in the District of Columbia. In 1983, Danik, which is currently bankrupt, was engaged in the "discount" or "off-price" retail sale of men's clothing in the District of Columbia area under the trade-name "Dash's Designer." Danik was a family business whose

principals were John Dashtara, his brother, Dar Dash, and Dar's wife. Respondent Hartmarx is a Chicago-based national manufacturer and retailer of high quality men's clothing. Hart, Schaffner & Marx and Hickey-Freeman Co. are wholly-owned corporate subsidiaries of Hartmarx (hereinafter collectively referred to as the Hartmarx group).

Litigation between Danik and Hartmarx began in June, 1983 when Intercontinental Apparel, Inc., another wholly-owned subsidiary of Hartmarx Corporation, brought an action against Danik in the United States District Court for the District of Columbia seeking damages on an account. Danik filed a counterclaim alleging price discrimination violations under the Robinson-Patman Act, 15 U.S.C. § 13. In March 1984, the District Court (The Honorable Oliver Gasch) granted summary judgment in favor of Intercontinental on the claim and the United States Court of Appeals for the District of Columbia Circuit affirmed. In February 1985, a jury returned a verdict for Intercontinental on the antitrust counterclaim which the D.C. Circuit also affirmed.

While the above-described litigation was in its early stages, Cooter & Gell became familiar with Danik's business in the men's clothing industry. Danik's principals informed Cooter & Gell that in an effort to preserve artificially high prices for Hartmarx's lines of better men's suits, Hartmarx Corp., Hickey-Freeman Co. and Hart, Schaffner & Marx maintained a policy of exclusive dealing throughout the major metropolitan areas of the United States.

Based upon this information, Cooter & Gell began its own inquiry to determine if a reasonable basis existed for the client's factual claims. A Cooter & Gell attorney and secretary called retailers in Washington, D.C., Baltimore, Philadelphia and New York City to investigate the information it had received from its client that Hartmarx did not sell to more than one retailer in each city. All

the inquiries confirmed the client's charges that Hartmarx did sell to only one retailer in each city. In light of this inquiry, Cooter & Gell believed that it could rely upon its client's factual descriptions of the nationwide practices by Hartmarx in the men's clothing industry.

Cooter & Gell drafted an initial version of the complaint at issue here and presented it to counsel for Hartmarx, the same attorneys opposing Danik in the Intercontinental Suit. Later, the final version of the Hartmarx Complaint was also provided to counsel for Hartmarx before filing. Although the Hartmarx attorneys may have regarded the Hartmarx Complaint as factually spurious from the moment they saw its earlier draft, they never revealed their disagreement with the factual underpinning of the complaint to Cooter & Gell.

Hearing nothing from Hartmarx in response to the draft complaint, in November 1983, Cooter & Gell filed the antitrust complaint at issue here. The Complaint alleged violations of the Sherman Antitrust Act, 15 U.S.C. § 1, and the Clayton Antitrust Act, 15 U.S.C. § 12, based on the exclusive retailer agency policy of the Hartmarx group. In response, Hartmarx filed a motion to dismiss and a motion for sanctions pursuant to Rule 11, claiming that Cooter & Gell had not made sufficient prefiling inquiries.

In late 1983, therefore, Danik had two antitrust actions pending in the district court against Hartmarx Corporation and its subsidiaries. For economic reasons, Danik agreed, upon advice of counsel, to voluntarily dismiss the instant suit. In April 1984, Danik filed a notice of voluntary dismissal without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(i).

In June 1984, counsel argued the motion for sanctions, and the court took the matter under advisement. Nearly four years later, in early 1988, the District Court invited Hartmarx to submit its statement of fees and

expenses for consideration. (App. *infra*, 32a).[1] In February 1988, the District Court granted Hartmarx's motion for sanctions. The court awarded Hartmarx over $30,000, two-thirds to be paid by Cooter & Gell and one-third to be paid by Danik.

Cooter & Gell appealed the imposition of sanctions. The appeal was based on the claim that the District Court lost jurisdiction over the motion when the case was voluntarily dismissed. Cooter & Gell further argued that even if the court retained jurisdiction, the sanctions were improperly imposed because the prefiling inquiry conducted was objectively reasonable. Cooter & Gell also claimed the award was excessive. The Court of Appeals rejected Cooter & Gell's arguments, upheld the District Court decision, and additionally ordered Cooter & Gell to pay Hartmarx's attorney's fees for the appeal.

REASONS FOR GRANTING THE PETITION

Rule 11 of the Federal Rules of Civil Procedure, as amended in 1983, has been both vigorously and unevenly applied, leaving the federal judiciary and bar in an "Era of Sanctions," but lacking an integrated code to supply coherent guidance. *See Eastway Construction Corp. v. City of New York*, 821 F.2d 121 (2d Cir. 1987) (Pratt, J. dissenting) (noting "apparent disparities, even capriciousness, [now seem] to characterize much of Rule 11 jurisprudence"), *cert. denied*, —— U.S. ——, 108 S. Ct. 269 (1987). As a result, Rule 11 has become the cottage industry of the litigation bar. *See* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988).[2] As one commentator has stated:

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[1] Ironically, the District Court's invitation came on the heels of another, completely unrelated trial in which Cooter & Gell represented one of the parties. *See Kuwait Airways Corp. v. First American Bank, N.A., et al.*, No. 88-7039.

[2] Along with the escalation in Rule 11 litigation, there has been an "explosion" of Rule 11 literature. Much of it is highly critical of Rule 11. *See Vairo*, 118 F.R.D. at 200 n.59 (citing Nelken, *Sanc-*

> Whether Rule 11 is upgrading the quality of civil litigation practice is debatable. That it is adding to the quantity is not. More than 1,000 Rule 11 decisions have been rendered since August 1983. The rule generates its own momentum: Lawyers move for sanctions; judges invite lawyers to move for sanctions; lawyers move for sanctions against lawyers whose offense is a prior motion for sanctions.
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> • • • •
>
> [I]t is apparent that not all judges agree, in philosophy or in practice, on precisely what conduct constitutes a violation of the rule. *Practicing under Rule 11 is like negotiating a minefield. You know there will be an explosion if you step on a mine. The trouble is, you don't know where the mines are.*

Joseph, *The Trouble with Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 A.B.A. J. 87, 88-9 (1987) (emphasis added).

Judge Schwarzer, of the Northern District of California, writes that the application of Rule 11 is confused and that the courts' standards are unpredictable. Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988). In Judge Schwarzer's view, this raises an issue of fairness, because "[s]anctions may have penal consequences, including injury to a lawyer's reputation, investigation by state bar associations, and adverse effects on malpractice insurance coverage." *Id.*[3]

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tions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313 (1986); Note, *Plausible Pleading: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630 (1987)); *see also*, Note, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale L.J. 901 (1988); Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988); Joseph, *The Trouble with Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 A.B.A. J. 87 (1987).

[3] Judge Schwarzer is not exaggerating the consequences of the Rule 11 sanction. As a result of the recent publication of the D.C. Circuit's opinion in *Danik*, an investigation into this matter has been initiated by the D.C. bar. In addition, opposing counsel in other cases have used the sanction award as a threat to various members of the law firm, including bringing it to the attention of the court in a pleading in at least one other unrelated case.

Not surprisingly, the Federal Courts of Appeals are split over several key issues in this case. Direct conflict between the circuits exists on the issue of whether a trial court retains jurisdiction to impose Rule 11 sanctions following a Rule 41 notice of voluntary dismissal. The courts are also not in agreement as to the standard to be used in determining the reasonableness of the plaintiff's prefiling inquiry in an antitrust case. Further, there is conflict as to whether an "abuse of discretion standard" is appropriate for the review of Rule 11 sanctions. Lastly, there is conflict over the interrelation between Fed. R. Civ. P. 11 and Fed. R. App. P. 38: the courts are split as to whether a party is automatically entitled to sanctions for the appeal when the appellate court affirms the lower court's imposition of sanctions. These issues, involving uniform enforcement of the Federal Rules of Civil Procedure, and the standard of conduct expected of the federal bar, are particularly suited to review by this Court. *See generally Hickman v. Taylor*, 329 U.S. 495 (1946); *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964); *Hanna v. Plumer*, 380 U.S. 460, 463 (1965).[4] It

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[4] *See also Schiavone v. Fortune*, 477 U.S. 21 (1986) (certiorari was granted because of an apparent conflict among the Courts of Appeals regarding Fed. R. Civ. P. 15(c)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (granted certiorari to resolve conflict concerning standard to be applied under Fed. R. Civ. P. 56); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984) (certiorari was granted to resolve a conflict regarding demand requirement of Fed. R. Civ. P. 23.1); *White v. N.H. Department of Employment Security*, 455 U.S. 445 (1982) (certiorari was granted to resolve the timeliness standard set forth in Fed. R. Civ. P 59(e)); *Snyder v. Harris*, 394 U.S. 332 (1969) (certiorari was granted to resolve the conflict of whether Rule 23 allows separate claims to be aggregated to meet the $10,000 jurisdictional minimum); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967) (certiorari was granted because the case involved "a matter of significance to the administration of federal interpleader").

is respectfully submitted that the uncertainty facing other litigants, and the legal profession itself, caused by the lack of uniformity on these fundamental issues mandates further review of and a definitive answer on these issues by this Court.

I. There Is A Split Of Authority Over Whether A District Court May Impose Rule 11 Sanctions Following A Voluntary Dismissal Pursuant To Fed. R. Civ. P. 41(a)(1)(i)

In its opinion, the D.C. Circuit held that a Rule 41(a) notice dismissal did not deprive the District Court of jurisdiction to impose Rule 11 sanctions. This holding is in accord with similar holdings in the First, Seventh, Eighth and Ninth Circuits, and in direct conflict with holdings in the Second and Fifth Circuits. Relying on the Second Circuit decisions in *Johnson Chemical Co., Inc. v. Home Care Products, Inc.*, 823 F.2d 28 (2d Cir. 1987), and *Santiago v. Victim Services Agency*, 753 F.2d 219 (2d Cir. 1985), Cooter & Gell argued that once it filed a Rule 41(a) dismissal, the District Court was deprived of jurisdiction to impose Rule 11 sanctions. In rejecting Cooter & Gell's argument on appeal, the Court of Appeals relied on the decision of the Seventh Circuit in *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), which explicitly rejected *Santiago* and allowed post-dismissal sanctions.

In reversing a post-dismissal award of attorney's fees, the Second Circuit has stated flatly that, "[o]nce the plaintiff has dismissed the action . . . the Court loses all jurisdiction over the action." *Santiago*, 753 F.2d at 221. More recently, the Second Circuit directly addressed the specific issue of Rule 11 sanctions following a voluntary dismissal. In *Johnson Chemical Co., Inc. v. Home Care Products, Inc.*, 823 F.2d at 30, the District Court had granted the defendant's motion to vacate the plaintiff's voluntary dismissal and sanctioned the plaintiff under Rule 11. Reversing the trial court, the Second Circuit

held that the plaintiff has the "unfettered power" to file a notice of dismissal before an answer or motion for summary judgment has been filed. *Id.* (citing *Santiago*, 753 F.2d at 221). The reviewing court concluded that since the plaintiff was plainly entitled to a voluntary dismissal, the District Court lost all jurisdiction after the plaintiffs voluntarily dismissed, and therefore, Rule 11 sanctions could not be imposed. *Id.* at 31.

The Fifth Circuit has reached a similar conclusion on this issue. That court has consistently held that Rule 41(a)(1)(i) means just what it says. *Williams v. Ezell*, 531 F.2d 1261 (5th Cir. 1976) (where defendants filed neither an answer nor a motion for summary judgment prior to plaintiffs' notice of voluntary dismissal, district court had no power or discretion to deny plaintiffs' right to dismiss or to assess attorney's fees against them); *Carter v. United States*, 547 F.2d 258 (5th Cir. 1977) (defendants' motion to dismiss on the merits is not the equivalent of an answer and does not prevent plaintiffs from invoking unfettered right to voluntary dismissal). The district court has no power to deny the absolute right of a plaintiff to a voluntary dismissal. *Williams*, 531 F.2d at 1264. Further, filing a notice of dismissal automatically ends the case and "except for determining appealability, the subsequent orders . . . [of the district court are] a nullity." *Id.*

The Seventh Circuit, however, has held to the contrary in *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987). The court directly rejected the reasoning of *Santiago*'s holding that the district court lacks jurisdiction "to do anything at all" after voluntary dismissal. The *Szabo* court found that a court may lack "jurisdiction" to do some things but not others, and one of the things "jurisdiction" was retained over was post-dismissal imposition of Rule 11 sanctions. *Id.* at 1077-79.

The First and Ninth Circuits have followed the *Szabo* decision, both holding that voluntary dismissal does not deprive the court of jurisdiction to consider a motion for sanctions pursuant to Rule 11. *Greenberg v. Sala*, 822 F.2d 882 (9th Cir. 1987); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988).[5]

Apart from the unique timing question presented by this case—where the court below retained "jurisdiction" for almost *four years* after dismissal—there are several reasons to prefer the Second Circuit's holdings in *Santiago* and *Johnson* to that of *Szabo* and its progeny. First, there is the fact that Rules 11 and 41 simply admit to no exception to the "bright line" of the plaintiff's unfettered power to dismiss voluntarily and with finality pursuant to Rule 41(a)(1)(i). *Johnson*, 823 F.2d at 30. If the drafters had wished to propose such an exception, they could have done so, and it is up to neither a district court to assume, nor a reviewing court to create, authority withheld by the Rules.

Second, permitting even this encroachment upon the letter of Rule 41 is to disapprove the many and varied cases interpreting its provisions strictly. *See* 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 41.02 [2] and [3] (2d ed. 1982) and cases collected therein. Many have tried and failed to chip away at the rule's straightforward language without success for. as noted by the Sixth Circuit, "although Rule 41 has been amended three times since 1948, it has not been broadened to include other motions or pleadings which would bar a dismissal by notice." *D.C. Electronics, Inc. v. Martron Corp.*, 511 F.2d 294, 296 (6th Cir. 1975). This consideration—that many years of entirely consistent decisions affirming the unfettered power of a plaintiff to voluntary dismissal would be swept aside by carving an exception

[5] The Eighth Circuit independently reached a similar result in *Kurkowski v. Volcker*, 819 F.2d 201 (8th Cir. 1987).

for Rule 11 proceedings—was not addressed by *Szabo* or its progeny. This is no small concern; rejection of the accumulated jurisprudence surrounding Rule 41 is to invite other defendants to foray into the Courts of Appeals seeking decisions which would further transform that which has heretofore been a settled and immutable rule. The *Johnson* opinion preserves these precedents and the value of their guidance to litigants, while *Szabo* questions them even without discussion.

This indirect and perhaps unintended consequence not only is inconsistent with better jurisprudence but also potentially conflicts with a stated purpose of Rule 11 itself—to increase the efficiency of the judicial system. *See* Fed. R. Civ. P. 11 advisory committee notes, 97 F.R.D. 165, 198. That is, the affirmance by the D.C. Circuit following *Szabo* to increase the reach of Rule 11 will lead to a certain volume of satellite litigation over many other newly-asserted exceptions to the bar of a Rule 41 notice of dismissal. It is respectfully submitted that the potential for accomplishing good in post-dismissal Rule 11 proceedings is far outweighed by the certain harm, measured simply in terms of the multiplicity of assaults on Rule 41, which will surely result from the means to those ends. Thus, the *Johnson* decision not only preserves the integrity of the Rule 41 decisions but also serves one of the purposes of Rule 11.

It is critical that this Court resolve the conflict regarding imposition of Rule 11 sanctions following a Rule 41 notice of voluntary dismissal. Clearly, the existing situation is confusing to litigants. A litigant in a jurisdiction that has not addressed this issue cannot be certain what impact a voluntary dismissal will have on the case. Voluntary dismissal may terminate a case completely or may merely "stop the running of attorneys' fees." *See Szabo*, 823 F.2d at 1079. A litigant will simply have to dismiss and then wait to see how the issue is decided in that jurisdiction. This uncertainty can only impair an attor-

ney's ability to effectively and competently conduct a lawsuit, and may in fact encourage protracted litigation in the hopes that a plaintiff's theory will eventually be supported by the facts, instead of encouraging voluntary dismissals.

Furthermore, the split leads to unequal treatment of litigants. Individuals acting under the same federal rule do not receive the same treatment simply by virtue of the jurisdiction in which they bring suit. Litigants in the Second and Fifth Circuits can dismiss a case voluntarily and be assured that the entire matter is resolved. Litigants in the District of Columbia, First, Seventh, Eighth and Ninth Circuits, however, will be left hanging following a voluntary dismissal. Indeed, the filing of a voluntary dismissal may actually prompt the imposition of Rule 11 sanctions: a party may voluntarily dismiss, intending to terminate the case completely, only to find themselves faced with sanctions months, or as here—even years—after the dismissal. One of the primary reasons for having a single set of Federal Rules is to ensure that litigants in all jurisdictions are treated consistently. The split on this issue, however, results in disparate treatment. To assure equal treatment under the Federal Rules of Civil Procedure, and to give guidance to future litigants and the bar, it is respectfully submitted that this Court resolve this very fundamental split in the circuits regarding Rule 11 and Rule 41(a)(1)(i).

II. There Is A Split Of Authority Over The Standard Of Reasonableness Applied To A Plaintiff's Pre-Filing Inquiry In An Antitrust Case

In reaching its decision to affirm the award of Rule 11 sanctions, the D. C. Circuit failed to give any weight to the fact that this was an antitrust action. The Ninth and Sixth Circuits, however, have recently found that the standard of reasonableness of the prefiling inquiry in an antitrust action should be less demanding than that re-

quired in other cases. *See Comunity Electric Service Of Los Angeles, Inc. v. National Electrical Contractors Assoc., Inc.*, 869 F.2d 1235 (9th Cir. 1989); *D & M Orthotics & Prosthetics, Inc. v. Sisters of Mercy Health Corporation*, No. 88-1945, slip op. (6th Cir. June 5, 1989) (unpublished disposition—available on Westlaw).

The Ninth Circuit has held that in imposing sanctions, each case must be evaluated individually "in light of its own peculiar circumstances." *In re matter of Yagman*, 796 F.2d 1165, 1182 (9th Cir.), *reh'g denied and opinion amended*, 803 F.2d 1085 (9th Cir. 1986). The circumstances of an antitrust case are such that the defendants are usually in control of the proof necessary to establish plaintiff's case. *Community Electric*, 869 F.2d at 1246. Because of disparate access to information, it follows that a less demanding standard should be used in evaluating the prefiling inquiry in an antitrust action. This is precisely what the Ninth Circuit has held in *Community Electric*, 869 F.2d 1235. Focusing on the plaintiff's antitrust claims, the court said, "we grant summary judgment less frequently in the antitrust context, in part because the alleged conspirators control the proof. . . . *This less demanding standard should also apply under Rule 11 to evaluate the associated documents.*" *Community Electric*, 869 F.2d at 1246 (citations omitted) (emphasis added).[6]

In *D & M Orthotics*, the plaintiffs filed a complaint alleging violations of Sections 1 and 2 of the Sherman Act. Defendants moved for sanctions on the grounds that the prefiling inquiries were inadequate. Prior to filing the case, plaintiff learned from a competitor and some of

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[6] The fear of many critics that Rule 11 would become part of every defendant's litigation bag was not ill-founded. The reported cases confirm that Rule 11 is being used disproportionately against plaintiffs, especially in certain types of litigation, including, as here, antitrust cases brought by small companies. Vairo, *supra*, 118 F.R.D. at 200.

its own patients that the defendants were "out to destroy" the plaintiff. The court refused to impose sanctions, holding that this circumstantial evidence of a violation was a sufficient basis for the antitrust claims. *D & M Orthotics*, Westlaw p. 3. The district court held that once the complaint based on circumstantial evidence was filed, the facts necessary to prove the claim, including the market power of the defendants, could be developed through discovery. *Id.* at 4. The Sixth Circuit agreed, affirming the district court's denial of sanctions. *Id.*

As is clear from the opinion in this case, the D. C. Circuit ignored the difficult issues of proof confronting an antitrust plaintiff. *See Danik, Inc., et al. v. Hartmarx Corp., et al.*, 875 F.2d 890 (D.C. Cir. 1989). Although the D.C. Circuit acknowledged that disparate access to information is relevant to the imposition of sanctions, *id.* at 896, this factor simply was not taken into consideration when the District Court imposed sanctions, nor in the affirmance of those sanctions. Relying upon *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985), the Court of Appeals apparently imposed the same standard of reasonableness used in all Rule 11 actions. If the Court of Appeals had followed the less demanding approach of the Sixth and Ninth Circuits, rather than the strict dictates of *Westmoreland* (which arose in a totally different factual situation), it surely would have found Cooter & Gell's prefiling inquiry reasonable under the circumstances here, where the proof was controlled by the defendants.

Even if the less demanding standard is not applied however, the District Court and Court of Appeals erred in finding that the prefiling inquiry of Cooter & Gell did not satisfy Rule 11. As set forth above in the *Statement of the Case*, Cooter & Gell conducted an inquiry by telephone to confirm its client's claims that to preserve artificially high prices for its lines of better men's suits,

Hartmarx maintained a policy of exclusive dealing throughout the major metropolitan areas of the United States. The complaint was filed only after the client's initial allegations were supported by the information received in the telephone inquiry of the major east-coast markets. Cooter & Gell's own inquiry, coupled with the information from the client, clearly provided adequate support for the complaint to be filed.[7]

The confusion surrounding the standard to be applied to the reasonableness of the prefiling inquiry by an antitrust plaintiff must be settled with finality to ensure continued uniform enforcement of Federal antitrust laws. In recent years, private attorneys general have played a key role in the enforcement of the antitrust laws. If this issue is not resolved, the enforcement of these laws by private individuals will be sporadic, at best, and may all but cease. Because individuals will fear the imposition of sanctions for inadequate prefiling inquiries although they have acquired as much information as possible without the help of discovery, they will be hesitant to bring suit. Unless a violation is so flagrant that it can be proved without the help of discovery, plaintiffs will not file suit.

Not only will enforcement of antitrust actions be curtailed, the enforcement that does occur will be grossly unfair. In jurisdictions where plaintiffs are held to a less demanding standard of prefiling inquiry, enforcement will be vigorous. Plaintiffs will bring suit even though the antitrust nature of the case prevents them from obtaining conclusive proof of a violation prior to filing the complaint. In those jurisdictions imposing a more stringent standard, however, there will be virtually no enforcement because the burden on and risk to the

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[7] The erroneous finding of a Rule 11 violation was then compounded by the awarding of $32,103.78 in sanctions, an amount which was more than half of a legal fee that the District Court itself found "excessive." (*See* App. *infra*, 28a-30a).

individuals—the private attorneys general—is too great. Simply by virtue of the jurisdiction in which they are located, some companies will be almost immune from private enforcement of the antitrust laws. To ensure widespread, equitable and continued enforcement of federal antitrust laws, a single standard needs to be established.

III. There Is A Split Of Authority Over The Standard To Be Used In Reviewing Rule 11 Sanctions

The Memorandum of the District Court embodied several distinct and separately reviewable decisions. First, the court implicitly decided that it not only had the authority to decide the Rule 11 Motion notwithstanding Danik's Rule 41 dismissal, but also that it could retain jurisdiction over that motion for almost four years after the case was voluntarily dismissed. Apart from the question of the District Court's authority to proceed, the decision on the merits was comprised of three separately reviewable rulings. First, the court reached conclusions regarding certain facts. Second, the court applied the law to those facts to determine whether a violation of Rule 11 had occurred. Finally, the court exercised its discretion to decide upon the amount of the award and its division between attorneys and client. In 1985, the D.C. Circuit, in *Westmoreland v. CBS., Inc.*, 770 F.2d 1168, adopted a statement of the standards of review applicable to Rule 11 appeals. The *Westmoreland* opinion, which concerned a discovery matter, held that the district court is accorded wide discretion in determining whether factual or bad faith reasons exist which may give rise to sanctions under Rule 11 because "the district court has tasted the flavor of the litigation and is in the best position to make these kinds of determinations." *Id.* at 1174. Accordingly, a district court will be reversed if the Court of Appeals finds that it abused its discretion in finding the facts and/or applying the law of Rule 11 decisions to those facts. If the decision below concerns only the legal sufficiency of a pleading or motion, rather

than an inquiry into underlying facts, the question receives *de novo* review. *Id.* at 1175. In addition, when determining whether sanctions should have been imposed at all, the Court of Appeals ". . . must [also] consider whether the [district court's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (quoting *United States v. Columbia Broadcasting System, Inc.*, 666 F.2d 364, 371 (9th Cir.), *cert. denied*, 457 U.S. 1118 (1982)). Once the district court determines that a violation has occurred, the selection of an appropriate sanction is committed to its discretion. *Westmoreland*, 770 F.2d at 1174. Thus, under *Westmoreland*, the factual findings of the Court, application of the law to those facts and both the amount and division of sanctions are measured against the "abuse of discretion" standard. *Id.* Adhering to *Westmoreland*, the D.C. Circuit evaluated the District Court's findings here under the "abuse of discretion" standard.

Other courts have settled upon separate and distinct inquiries into the matters raised by Rule 11 sanctions. For example, the Eighth and Ninth Circuits review disputed factual determinations of the district court under a "clearly erroneous" standard, *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986), and the legal conclusion that the facts constitute a violation are reviewed *de novo*. *Id.* Only the appropriateness of the sanctions imposed is reviewed under an abuse of discretion standard. *Id.; accord Kurkowski v. Volcker*, 819 F.2d 201, 203 n.8 (8th Cir. 1987).

While Cooter & Gell contends that it should have prevailed under either scheme of review, it is respectfully submitted that in these circumstances review of disputed factual determinations by the "clearly erroneous" standard, and *de novo* review of the application of the law to the district court's determinations of facts, would be well suited to evaluating a district court's decision that the sanctioned party's conduct failed to con-

stitute a reasonable prefiling inquiry. This is consistent with the D.C. Circuit's review of ordinary judgments entered in the District Court. *See, e.g., Cuddy v. Carmen*, 762 F.2d 119, 123 (D.C. Cir.), *cert. denied*, 474 U.S. 1034 (1985), *reh'g denied*, 475 U.S. 1072 (1986) (factual questions reviewed according to the clearly erroneous standard, but selection and application of legal standards to the facts are reviewed *de novo*).

The Court of Appeals in this matter was as well positioned to judge the conduct of the parties as was the District Court. There was little "flavor" to the litigation in that barely five months elapsed from filing the complaint to its dismissal; there was never any live testimony; and all of the evidence submitted on the Rule 11 motion was written. Indeed, the questions presented here —apart from the amount and division of sanctions between attorney and client—are analogous to the appeal of the granting of a motion for summary judgment. As such, *de novo* review of the District Court's finding of a Rule 11 violation was entirely supportable. *Int'l. Union v. National Right To Work Legal Defense Foundation, Inc.*, 781 F.2d 928, 933 (D.C. Cir. 1986).

In sum, fairness to litigants and their counsel, who are entitled to "reasonable certainty and predictability," implicates a more particularized review of the factual and legal determinations comprising a Rule 11 decision than is accorded by the abuse of discretion standard. The consequences of a violation are simply too severe, and to achieve the desired levels of uniformity and judicial restraint requires a higher level of scrutiny.

IV. There Is A Split Of Authority Over The Automatic Imposition of Rule 11 Sanctions For An Appeal

The Court of Appeals found that the District Court's award under Rule 11 should also include appellate expenses incurred in defense of that award. *Danik, Inc.*, 875 F.2d at 897-98; *accord Hays v. Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988).

In conflict with the D.C. and Seventh Circuits, the Ninth Circuit has flatly rejected the contention that Rule 11 has been incorporated into the Federal Rules of Appellate Procedure. In *Orange Production Credit Assoc. v. Frontline Ventures, Ltd.*, 801 F.2d 1581, 1582 (9th Cir. 1986) (*Frontline*), a party which successfully defended the trial court's Rule 11 award sought its appellate fees as well. The Ninth Circuit stated:

> [E]very appellee who succeeded in preserving a favorable trial court award in a Rule 11 case would be entitled to fees on appeal regardless of the substance of the appeal. . . . *We do not perceive this to be the law.*

Id. (citations omitted) (emphasis supplied). Rather, the court held, attorney's fees on appeal can only be awarded *if the appellant is sanctionable under F. R. App. P. 38 in that the appeal is frivolous. Id.* at 1583.

The *Frontline* court distinguished *Westmoreland* as being limited to the situation where the appeal itself is *required* in order to reverse the district court's *denial* of a Rule 11 award. *Id.* at 1583 n.1. Similarly, in *Basch v. Westinghouse Electric Corp.*, 777 F.2d 165, 175 (4th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986), the Fourth Circuit held that appellate attorney's fees incurred for successful defense of an award under Rules 11 and 37 are not recoverable where the appeal was neither frivolous nor interposed for purposes of harassment or delay. *See also Eastway Construction Corp. v. City of New York*, 637 F.Supp. 558, 576 (E.D.N.Y. 1986), *modified and remanded on other grounds*, 821 F.2d 121, 124 (2d Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 269 (1987) (in the case of Rule 11, an award of attorney's fees for the costs of defending an appeal can be made only if the appeal was *frivolous*). Here, there was no finding by the Court of Appeals that Cooter & Gell's appeal was frivolous or for purposes of harassment or delay. Thus, award of further sanctions because

of the appeal was inappropriate. In any event, however, this issue requires Supreme Court review, as the Courts of Appeals have reached disparate conclusions regarding the propriety of "appellate" Rule 11 sanctions as an automatic addition to the trial court's imposition of sanctions.

CONCLUSION

For the foregoing reasons, Cooter & Gell respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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August 16, 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 23, 1989 Decided May 19, 1989

No. 88-7089

DANIK, INC., D.C. Corporation, on behalf of self and others similarly situated

COOTER & GELL,

Appellant

v.

HARTMARX CORPORATION, a Delaware corporation, et al.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 83-03568)

Dale A. Cooter, with whom *Joseph M. Cahill* was on the brief, for appellant.

Mark W. Ryan, with whom *Richard J. Favretto* was on the brief, for appellees. *Kenneth S. Geller* and *Douglas K. Mayer* also entered appearances for appellees.

Before: STARR, WILLIAMS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: This appeal arises from an antitrust action that appellants Cooter & Gell, a

law firm, brought on behalf of their client, Danik, Inc., a Washington, D.C. discount clothing retailer. The defandants in that action are appellees here: Hartmarx Corp. and its subsidiaries, Hickey-Freeman Co. (HF) and Hart, Schaffner & Marx (HSM)—collectively, the Hartmarx Group—manufacturers and distributors of men's clothing. After appellants voluntarily dismissed their case, the district court found that both attorney and client had violated Fed. R. Civ. P. 11 by failing to make a reasonable inquiry, prior to the filing of their complaint, into the facts alleged therein. The court awarded sanctions of $21,402.52 against Cooter & Gell and $10,701.26 against Danik.

Danik, which is now bankrupt, has not filed a brief in this court; by separate order, we dismiss its appeal for failure to prosecute. With respect to Cooter & Gell, we affirm the judgment in all respects and remand to the district court for it to award appellees the expenses they incurred on appeal.

I. Background

Litigation between Danik and Hartmarx goes back to June 1983, when Intercontinental Apparel, Inc., another Hartmarx subsidiary, filed a breach of contract action in the district court, claiming that Danik had failed to pay for approximately $100,000 of Intercontinental merchandise. Danik, represented by Cooter & Gell, counterclaimed, alleging that Intercontinental had engaged in price discrimination in violation of the Robinson-Patman Act. In March 1984, the district court granted summary judgment in favor of Intercontinental on the contract claim, and we affirmed. In February 1985, a jury found for Intercontinental on the antitrust counterclaim, and once again, we affirmed.

Meanwhile, in November 1983, while the above-described litigation was going forward, Cooter & Gell prepared two additional antitrust complaints—both class

actions—against appellees and others. Dale Cooter, Esq., of Cooter & Gell, "presented counsel [for Intercontinental] with draft copies of those complaints and outlined a settlement offer which encompassed the collection suit and the two class actions." Cooter Affidavit at ¶ 7. After Intercontinental rejected the settlement offer, Danik filed the two class action complaints.

The first complaint, on behalf of all men's retail clothing merchants in seven metropolitan areas, charged Hartmarx and three of its subsidiaries with price discrimination in violation of the Robinson-Patman Act. The district court stayed that action, pending resolution of the price discrimination counterclaim in the original Intercontinental contract action. In July 1986, Danik voluntarily dismissed this class action.

Danik's second class action complaint, which forms the background of the present dispute, was filed on behalf of "all men's retail clothing merchants in the United States other than . . . [Hartmarx's allegedly] exclusive agents . . . ." Danik claimed that the Hartmarx Group had established "an exclusive retailer agent policy" whereby Hartmarx sold men's suits made by HF and HSM to only one retailer in each major metropolitan area of the country, either upon the condition or by agreement that the retailer would sell at Hartmarx's "suggested retail price or at an artificially high price." According to the complaint, appellees thereby unlawfully fixed resale prices, allocated retail markets, and refused to deal with the plaintiff, in violation of the Sherman and Clayton Antitrust Acts.

Hartmarx filed a motion to dismiss this second suit, supported by affidavits in which HF and HSM executives denied the existence of any "exclusive retailer agent policy" and showed that, although each brand was distributed by only one retailer in Washington and one in Baltimore, it was in fact the defendant's general practice to sell to more than one retailer in each major metro-

politan area. Indeed, these executives reported that each brand was sold to as many as 20 different retailers in some markets. Hartmarx also moved for sanctions under Rule 11, which, in relevant part, states that:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading . . .; that to the best of his knowledge, information, and belief formed after *reasonable inquiry* it is *well grounded in fact* and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the expenses reasonably *incurred because of the filing* of the pleading, motion, or other paper including a reasonable attorney's fee.

(Emphasis added).

In response to the Rule 11 motion, Cooter & Gell submitted two affidavits describing their pre-filing investigation into the facts they had alleged. Joseph Cahill, Esq. stated that he "asked Faye Reid, a secretary at this firm, to telephone the better known clothing retailers in the Washington, D.C. area to inquire of them whether they sold [HSM] suits, and if not, whether they knew who did." Ms. Reid's affidavit, in turn, confirms that she spoke with "salespeople" at eight such retailers and with people in unspecified positions at two others. Based upon these conversations, Cahill concluded that "not one retailer besides Raleigh's appeared to sell [HSM] suits in the Washington, D.C. area." After he had made several calls to menswear stores in Baltimore, with like results, Reid conducted a similar inquiry of Philadelphia and New York retailers. On this bases, Cahill concluded

that only one retailer in each of these areas sold HSM suits. In the course of their pre-filing investigation, Cooter & Gell at no time asked anyone at Hartmarx about its distribution practices generally or for the names of the retailers that sold its suits in any metropolitan area.

In April 1984, while the defendants' motions to dismiss and for sanctions were pending before the district court, Danik dismissed the antitrust action voluntarily pursuant to Fed. R. Civ. P. 41(a)(1)(i). In June, counsel argued the Rule 11 motion. Cooter stated that the impetus for the complaint had come from the president of Danik, who told Cooter that Danik had been unable to purchase HF and HSM suits, that only one retailer in the Washington, D.C. area carried those brands, and "that it was his understanding that that was a nation-wide practice" on the part of Hartmarx. The district court then took the Rule 11 motion under advisement.

More than three and one-half years later, in February 1988, the district court granted the motion, identifying several fundamental deficiencies in Cooter & Gell's pre-filing inquiry. First, counsel's inquiry concentrated solely on HSM "and thus in no way justified the claim of exclusive retail agency arrangements for [HF] apparel." Second, counsel limited their pre-filing investigation to "four eastern cities" and, consequently, had "no support for the allegation that exclusive arrangements existed in *every major metropolitan area.*" (Emphasis in original.)

Third, the court concluded that "counsel's random telephone investigation is far removed from the type of systematic inquiry needed to conclude that allegations of the severity alleged by plaintiff are 'well grounded in fact.'" Specifically, the court observed that "counsel contacted only a few retailers in cities where dozens of retailers were in business [and] sought the opinion of salesmen instead of management personnel who might have personal knowledge of the alleged exclusive retail agency policy." Finally, the court noted that "exclusive retail agency policies, by themselves, are not per se vio-

lative of antitrust laws." To prevail under the Rule of Reason, a plaintiff must, in adition, "plead, and show, anticompetitive effects . . ., such as price-fixing or retail price maintenance in order to prevail." Counsel's investigation had neither sought nor revealed anything of that sort.

The court then turned to the calculation of costs and attorney's fees and concluded that the $61,917.99 requested by Hartmarx was "excessive." The court found that defendants' counsel had devoted substantial time to research "not reasonably necessary to achieve dismissal of the case." The court concluded that an award of $32,103.78 would serve as an appropriate Rule 11 sanction, two-thirds to be paid by Cooter & Gell and one-third by Danik, which had "authorized the prosecution of this lawsuit albeit on the advice of counsel. . . ."

II. JURISDICTION

Appellants argue initially that their client's voluntary dismissal of the class action that gave rise to the Rule 11 motion divested the district court of jurisdiction to resolve that motion. As the question is one of first impression in this circuit, appellants rely on *Johnson Chemical Co., Inc. v. Home Care Products*, 823 F.2d 28 (2d Cir. 1987). There, a district court had vacated plaintiff's voluntary dismissal and, thereafter, imposed Rule 11 sanctions. On appeal, the Second Circuit held that the district court could not then impose sanctions because "[o]nce [the plaintiff] had dismissed the action under Rule 41(a)(1)(i), the court lost all jurisdiction over the action." *Id.* at 31.

Like the other circuits that have confronted this issue, we think a more particularized analysis is in order. *See Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987). *See also Kurkowski v. Volcker*, 819 F.2d 201, 203 (8th Cir. 1987)

(court retains jurisdiction (1) because defendant's motion to dismiss, filed before plaintiff's voluntary dismissal, renders inapplicable the self-executing dismissal provisions of Rule 41(a)(1)(i), and (2) due to court's "inherent authority over the cases and parties before it"); *Greenberg v. Sala*, 822 F.2d 882 (9th Cir. 1987) (affirming Rule 11 sanction after voluntary dismissal without attention to jurisdictional issue). As the Seventh Circuit has observed in this very context, "[a] court may have power to do some things but not others, and the use of 'lack of jurisdiction' to describe the things it may not do does not mean that the court is out of business." *Szabo*, 823 F.2d at 1077. For example, a court "that loses its power to decide the merits—perhaps because it has decided them once already [in entering a final judgment]—does not lose power to award attorney's fees that may be in order as a result of what happened before the final decision." *Id.* Further:

> An award of fees under Rule 11 is more like a sanction for [criminal] contempt of court than like a disposition on the merits or even an award of costs. An award under Rule 11 is a "sanction" for violating a rule of court. The obligation to answer for one's act accompanies the act; a lawyer cannot absolve himself of responsibility by dismissing his client's suit.

Id. at 1079.

Appellants offer three arguments against this reasoning. First, they point to the text of Rules 11 and 41, which "simply admit to no exception to the 'bright line' of the plaintiff's unfettered power to dismiss voluntarily and with finality pursuant to Rule 41(a)(1)(i)." In our view, however the wording of the two rules is not dispositive of the relationship between them. For the reasons elaborated below, we believe that the policies behind Rule 11 do not permit a party to escape its sanction by merely dismissing an unfounded case. The bene-

fits to such a dismissal would accure to precisely those plaintiffs for which Rule 11 intends "punishment and deterrence," *Westmoreland v. CBS, Inc.*, 770 F. 2d 1168, 1180 (D.C.Cir. 1985), while the costs Rule 11 is designed to shift would remain with the defendant upon whom the plaintiff unfairly thrust them. Absent a contrary indication in the purposes of Rule 41, we are loathe to read Rule 11 so manifestly against its grain.

Appellants respond that we need not concern ourselves with such abuses of Rule 41, since the defendant can always "bar a Rule 41 dismissal by the simple expedient of filing either an answer or a motion for summary judgment." Under Rule 11, however, the defendant may stand on its motion to dismiss coupled with a motion for sanctions—as Hartmarx has done—and need not incur the burden of further pleadings. It is no answer to say that the defendant may preserve its Rule 11 motion only by incurring further unnecessary costs.

Second, appellant contends that affirmance here will undermine the Rule 11 interest in judicial efficiency by encouraging litigation "over many other newly-asserted exceptions to the bar of a Rule 41 . . . dismissal." Appellants do not identify any such possible exceptions, however, and we can foresee none. Moreover, appellants ignore the deterrent effect that survival of a Rule 11 motion has on the number of sanctionable complaints—and the contrary effect that non-survival would have. If a party could immunize itself from a meritorious Rule 11 motion by voluntarily dismissing its case, the risks associated with the filing of an inadequately investigated complaint would be significantly diminished; and as the price of such misconduct fell, of course, its frequency would rise. In terms of appellants' efficiency argument, therefore, the relevant inquiry would compare the cost of the litigation that appellants predict will occur against the benefits realized by preventing so facile a circumvention of Rule 11 sanctions. In any event, we do not share appellants' fear that, after a Rule 41 dismissal, the survival *vel non* of a host or other matters will be litigated because of the outcome here. Therefore, we conclude that the gains from preserving the deterrent power of Rule 11 outweighs the offsetting costs, if any, of litigation concerning the survival of other, unspecified types of matters.

Third, appellants strive mightily to ward off the power of the analogy between Rule 11 sanctions and criminal contempt suggested by the Seventh Circuit, *see* p. 7, *supra*, for not only would a contempt citation survive even a voluntary termination of the case from which it arose, *cf. United States v. United Mine Workers of America*, 330 U.S. 258, 294 (1947) (court may punish criminal contempt notwithstanding mootness of underlying action), but this longstanding "exception" to Rule 41 finality has not spawned the sort of litigation appellants suggest will inevitably follow in the wake of our holding that a Rule 11 motion likewise retains its vitality after voluntary dismissal. Thus, appellants go on at length about *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) (*en banc*), in which the court rejected the analogy in the context of deciding that due process does not require use of the Federal Rules of Criminal Procedure in Rule 11 proceedings. *Id.* at 1558-59. That case did not address, however, the distinct question of whether the analogy between Rule 11 and contempt proceedings tends to support post-dismissal jurisdiction over a pending Rule 11 motion. We think it surely does.

Rule 11 sanctions, like penalties for criminal contempt, are, as we said in *Westmoreland*, *supra*, punitive and deterrent in purpose (though they are also compensatory in effect). They are meant to deter the filing of unfounded pleadings, which is an abuse of the judicial process. As in criminal contempt, the court has an interest in deterring such conduct independent of the burdened

party's interest in recovering its expenses. Accordingly, a court may award Rule 11 sanctions or issue a contempt citation *sua sponte*. The Advisory Committee on Rules put it this way: "The detection and punishment of a violation of the signing requirement . . . is part of the court's responsibility for securing the [legal] system's effective operation." Advisory Committee Note, Fed. R. Civ. P. 11. In relevant respects, therefore, Rule 11 is analogous to criminal contempt; the systemic interest in its proper functioning requires that it be available in appropriate circumstances notwithstanding a private party's effort to cut its losses and run out of court, using Rule 41 as an emergency exit.

Appellant argues, in the alternative, that even if this court would generally hold that a Rule 11 motion survives a Rule 41 dismissal, we should nonetheless find jurisdiction lacking here due to the extraordinary lapse of time between the voluntary dismissal and the imposition of sanctions. We are sympathetic to the concern that a lawyer who has other business before the court may feel something of a chill while the Rule 11 motion pends; the sooner the matter is resolved the better. Indeed, the Advisory Committee specifically "anticipated that in the case of pleadings, the sanctions issue under Rule 11 normally will be determined at the end of the litigation . . . ." *Id.* That is surely the better practice. The Committee also provided, however, that "[t]he time when sanctions are to be imposed rests in the discretion of the trial judge." *Id.* Though an extended delay is much to be lamented, therefore, we do not see that delay alone can divest the district court of jurisdiction properly vested there.

Accordingly, we conclude that the district court had jurisdiction to resolve appellees' Rule 11 motion notwithstanding voluntary dismissal of the underlying action and the subsequent delay in its ruling on the matter.

III. Rule 11 Liability

We find not difficulty in affirming liability under Rule 11 here, as none of appellants' arguments calls into doubt the "two obvious deficiencies" that the district court identified in their pre-filing investigation of the facts: specifically, appellants failed to engage in any inquiry whatsoever concerning the allegations against HF (as distinguished from HSM), and they claimed a nationwide conspiracy between defendants and selected merchants in each metropolitan area after polling merchants in only four eastern cities. Appellants' account of their efforts does no more than confirm these shortcomings; they make no attempt to justify them beyond first making the obvious point that it would have been bootless "to ask retailers if they were conspiring with Hartmarx to violate the antitrust laws" and then asserting that they pursued their prefiling inquiry "to the point where it was no longer cost effective to continue." It is impossible to see how "no inquiry" could be a "reasonable inquiry" with regard to the HF allegation or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere.

Appellants understandably, therefore, focus upon the district court's observation that "[i]n addition, counsel's random telephone investigation is far removed from the type of systematic inquiry needed to conclude that allegations of the severity alleged by plaintiff are 'well grounded in fact.'" According to appellants, the court's reference to a "systematic inquiry" erects a more stringent standard than the "reasonable inquiry" specified in Rule 11. Read in context, however, it is obvious that the reference to a "systematic inquiry" merely reflects the court's conclusion that, by contacting "salesmen instead of management personnel," and then at only a handful of stores out of dozens in each city, Cooter & Gell had not made an inquiry reasonably commensurate with the extent of their allegations.

Appellants further contend that their investigation of exclusive dealing was reasonable because Hartmarx had the greater access to the terms of its resale agreements and to the identities of its retailers. We agree to the point that disparate access to the information necessary for a putative plaintiff to determine the viability of its prospective cause of action is relevant to the inquiry called for in Rule 11. It simply does not follow, however, that a plaintiff can be excused altogether from the need to make a "reasonable inquiry" into the facts it alleges; rather, the disparate access point goes to the question of what is reasonable given the nature of the information to be obtained. For example, a reasonable inquiry into whether a defendant's activities affect interstate commerce would yield something closer to a certainty than would a reasonable inquiry into whether a defendant harbored an unulawful motive when discharging the plaintiff.

Here, appellant not only limited its investigation to a sampling of salesmen in four eastern cities, it did not even try to ascertain from Hartmarx whether it sold its suits through multiple retailers in major markets. If Hartmarx had refused to answer such a straightforward question, which would not seem to threaten any trade secret, then perhaps it would have been reasonable for appellants to infer that something was amiss. Normally, after all, one would expect a manufacturer to be pleased to say where its product can be bought; indeed, counsel for Hartmarx represented at oral argument that the company had in place an "800" telephone number in order to assist prospective customers in precisely this regard.

The district court also found that appellants were required but failed to adduce factual support for their claim that the "exclusive retail agent policy" they alleged had any anticompetitive effects, such as to run afoul of the Rule of Reason in antitrust. *See Continental T.V. v.*

GTE Sylvania, 433 U.S. 36 (1977). Examination of this rationale would require us to speculate on the extent to which any plaintiff could reasonably be expected to ascertain such information before it invokes the coercive powers of discovery. Since the district court applied the correct legal standard and offered substantial justification for its finding of a Rule 11 violation in other respects that go to the heart of the complaint, it is unnecessary for us to go further.

IV. Amount of the Sanction

Appellants contend that the district court abused its discretion by awarding defendants more than half of a legal fee that the court itself found "excessive." Indeed, the district court found that defense counsel had overstaffed the case and that "the results of much of [the] research [conducted by defense counsel] were not reasonably necessary to achieve dismissal of the case. . . ." The district court was not obliged to and did not detail how it arrived at the decision to allow over half of defendants' legal fees, but presumably based its decision upon an approximation of the amount of necessary work performed by defense counsel.

In reviewing a district court decision to award all or some lesser amount of the attorney's fees of a party prevailing on a Rule 11 motion in the face of a challenge that the award is excessive, we remain mindful that the district court, in such circumstances, exercises a virtually untrammelled discretion. *See Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686, 691 n.6 (D.C. Cir. 1987) ("even if the award [which was reduced to $42,085 from the $71,202 requested] overcompensates plaintiff for unnecessary expenses caused by defendant, it could still have been justified for punitive and deterrent purposes"). Indeed, we can identify no instance in which this court has ordered any change in the amount of such a sanction. When the district court, without explanation, awards as

a sanction an amount no greater than the costs and attorney's fees incurred by the party moving under Rule 11 and the award is challenged as excessive, only the very rarest case could justify our finding its decision an abuse of discretion.

V. Costs on Appeal

Hartmarx asks us to require appellants to pay the expenses, including attorney's fees, it has incurred in defending its award on appeal. Appellants respond by arguing that "Rule 11 simply does not reach beyond proceedings in the trial court" and that, accordingly, this court may award appellate expenses only if the appeal is "frivolous" under Fed. R. App. P. 38.

Although our decision in *Westmoreland*, 770 F.2d at 1179, involved an award of appellate expenses to one who successfully *challenged a denial* of Rule 11 sanctions by the district court, the reasoning we used to reach that conclusion dictates the outcome in the case at hand, where Hartmarx *defends the grant* of a Rule 11 award. In *Westmoreland*, we looked initially, by analogy, to *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 475 (7th Cir. 1984), in which the Seventh Circuit noted that requiring a party to bear appellate expenses in defense of an award under Fed. R. Civ. P. 37 (abuse of discovery) "could greatly offset the amount of the sanction and thus create a disincentive for seeking sanctions." 770 F.2d at 1179. Based on the premise that the policies behind Rule 11, like those underlying Rule 37, support recovery of appellate costs by a party defending an award thereunder, we then reasoned that the same logic supports recovery of appellate costs in the reverse situation, involving a successful challenge to denial of Rule 11 sanctions. As we noted in *Westmoreland*: "It is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many litigants in appellant's position to conclude that the vindication of the Rule 11 interests is not worth the candle." *Id.*

Closely parsing the language of Rule 11, we ultimately concluded, that an appellant may recover its appellate expenses as they were "incurred because of" the filing for which sanctions should have been imposed by the district court. *Id.* Today, we merely reaffirm *Westmoreland*'s premise that Rule 11 authorizes an appellee to recover the costs it incurs in a successful defense of a Rule 11 award. The First Circuit has adopted the same approach, for the same reasons. *See Muthig*, 838 F.2d at 607.

To resist the force of *Westmoreland*, appellants point to *McLaughlin v. Bradlee*, 803 F.2d 1197, 1206 (D.C. Cir. 1986), in which we affirmed a Rule 11 sanction but nonetheless declined to award appellees the expenses they incurred in defending the matter on appeal. It appears, however, that appellees in that case did not argue that Rule 11 authorized or required such an award but, instead, merely called upon this court to exercise its own authority to sanction "frivolous" appeals under Fed. R. App. P. 38. *Accord Basch v. Westinghouse Electric Corp.*, 777 F.2d 165, 175 (4th Cir. 1985) (appellate defense of Rule 11 and Rule 37 sanction not recoverable where appeal "not frivolous nor . . . interposed to harass . . . or to delay implementation of a valid discovery order," but no indication that appellee invoked Rule 11 as basis for recovery of appellate expenses).

Appellants note further that the Ninth Circuit apparently takes a different view than ours concerning the relevant standard for recovery of appellate expenses. In *Orange Production Credit Assoc. v. Frontline Ventures, Ltd.*, 801 F.2d 1581 (9th Cir. 1986), the court rejected appellees' argument "that the policy behind Rule 11 mandates that fees on appeal be awarded whenever a district court's award of Rule 11 sanctions is affirmed." *Id.* at 1582. The Ninth Circuit denied recovery of appellate expenses because "the appeal was not frivolous under Fed. R. App. P. 38." *Id.* at 1583. The court sought to distinguish *Westmoreland* on the ground that the appeal

there was taken in order to obtain an award of fees erroneously denied by the district court. *Id.* at 1583 n.1. The distinction is obscure, however, not only as a matter of logic, but also because the Ninth Circuit itself noted without further comment that *Westmoreland* "referred to policy considerations which favor an award of fees on appeal in order to preserve sanctions awarded by the trial court"—the very situation in which the Ninth Circuit denied recovery.

The Seventh Circuit, in dicta, has spoken to the relationship between Fed. R. Civ. P. 11 and Fed. R. App. P. 38 as well, noting that "just as the *district* court cannot award fees under Rule 38 of the appellate rules, . . . so the court of *appeals* cannot award fees under Rule 11 of the civil rules." *Hays v. Sony Corp. of America*, 847 F.2d 412, 420 (7th Cir. 1988) (emphases in original). *Accord Steffl v. J.I. Case*, 862 F.2d 692, 696-97 n.4 (8th Cir. 1988) (dictum). The civil rules, of course, "govern the procedure in the United States *district* courts. . . ." Fed. R. Civ. P. 1 (emphasis added). Here, however, we do not "award fees under Rule 11"; we merely reaffirm that the district court's award under Rule 11 of expenses "incurred because of" the unfounded filing should include appellate expenses reasonably incurred in defense of that award. As in *Westmoreland*—and as the Seventh Circuit itself has recently done—we remand to the district court to determine such expenses and, ultimately, to enter an appropriate award. *See Westmoreland*, 770 F.2d at 1179 ("calculation of the amount of the appellate attorneys' fee award can best be made by the district court"); *Hamer v. County of Lake*, Nos. 88-1332 & 88-1354, slip op. at 5 (7th Cir. March 13, 1989) ("remand[ing] in order that the district court may make an additional award of attorney's fees to the appellees under Rule 11 for legal services required in successfully defending [a Rule 11 award]").

VI. Conclusion

Having concluded that the district court had jurisdiction to resolve the motion for Rule 11 sanctions, that the court correctly found appellant's pre-filing inquiry to be inadequate, and that the court's determination of the amount of the sanction was within its broad discretion, we affirm the order of the district court in all respects. In addition, appellees are entitled to reasonable appellate expenses, as determined by the district court on remand.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3568-OG

DANIK, INC.,
Plaintiff,

v.

HARTMARX CORPORATION, *et al.*,
Defendants.

Counsel:

For Plaintiff:

Dale Cooter, H. Kenneth Kudon, Joseph Cahill, and Nicholas Hantzes, Washington, D.C.

For Defendants:

Richard J. Favretto, Marc Gary, Mark Ryan, and Rhonda Schwartz, Washington, D.C.

MEMORANDUM

[Filed February 26, 1988]

This case is before the Court on defendants' motion for the imposition of sanctions for violation of Rule 11 of the Federal Rules of Civil Procedure. Defendants' contention is that plaintiff and its counsel violated Rule 11 by not making a reasonable inquiry into the facts prior to the filing of the case and by interposing the complaint for an improper purpose.

I. BACKGROUND

This case was one of four cases involving Danik, Inc. that, at one time or another, have been before this Court. Danik is a Washington, D.C. corporation that owns and operates Dash's Designer retail clothing stores. Defendants are the Hartmarx Corporation and Hickey-Freeman Co., Inc. and Hart, Schaffner & Marx, two Hartmarx subsidiaries. All of the defendants engage in the manufacture and distribution of men's apparel.

The complaint in this case was a class action brought by Danik on behalf of "all men's retail clothing merchants in the United States other than those that are exclusive agents of the defendants . . . for the sale of Hart, Schaffner and Marx suits." The complaint asserted that the defendants established "an exclusive retailer agency policy whereby Defendants will only sell Hart, Schaffner & Marx and Hickey-Freeman men's suits to one retailer in each major metropolitan area in the United States" upon the agreement that such suits will be sold "at the Defendants' suggested retail price or at an artificially high price." The defendants and their retailer coconspirators were alleged to have engaged in illegal price-fixing, territorial restrictions, resale price maintenance, and other unfair competition practices in violaiton of Section 1 of the Sherman Act.

On January 27, 1984, defendants moved to dismiss the case for failure to state a claim. On February 2, 1984, defendants moved for Rule 11 sanctions. Danik opposed both motions. On April 30, 1984, before any action was taken on the Rule 12(b)(6) motion, plaintiff voluntarily dismissed the case. The Rule 11 motion was argued in open court on June 15, 1984.

II. DISCUSSION

Rule 11 was amended in 1983 to impose higher standards of conduct upon parties, and their attorneys, who choose to litigate in federal courts. *See* Advisory Com-

mittee Notes to 1983 Amendment to Rule 11 ("Advisory Committee Notes"). In pertinent part, the amended Rule provides:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

"Unlike the pre-amendment Rule 11, which required a showing of subjective bad faith, Rule 11 now incorporates, through its language 'formed after reasonable inquiry,' an objective test." *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1177 (D.C. Cir 1985); *see also Hashemi v. Campaigner Publications, Inc.*, 784 F.2d 1581 (11th Cir. 1986); *Zalvidar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986); *Eastway Construction Co. v. City of New York*, 762 F.2d 243 (2d Cir. 1985). If a court finds a violation, "Rule 11 *requires* that sanctions of some sort be imposed." *Westmoreland*, 770 F.2d at 1174-75 (emphasis in original).

A. *Investigation of Factual Allegations of the Complaint*

Defendants first contend that plaintiff and its counsel failed to make a reasonable inquiry before alleging that defendants maintained an exclusive retailer agency policy that limited sales of Hart, Schaffner and Marx and Hickey-Freeman suits to one retailer in each major metropolitan area in the United States. Defendants also assert that no reasonable inquiry was made into the allegations of price-fixing, territorial restrictions, resale price maintenance, or other unfair competition practices.

Defendants have submitted affidavits stating that Hart, Schaffner and Marx suits are distributed to more than one retailer in each of fifteen major metropolitan areas save Washington, D.C. The affidavits also reveal that, except in Washington, D.C. and Baltimore, Maryland, Hickey-Freeman suits are sold to more than one retailer in each of the same fifteen major metropolitan areas.[1] The affidavits deny the existence of any exclusive retail agency policy, price-fixing, or resale price maintenance as to either Hart, Schaffner and Marx or Hickey-Freeman suits.

In addition, defendants cite the testimony of Manoochehr John Dashtara, president of Danik, who signed an affidavit in the complaint which stated that the facts set forth in the complaint were true to the best of his knowledge, information, and belief. In a deposition taken on February 29, 1984, Dashtara stated that he relied wholly upon the representations of counsel and conducted no independent review of the factual allegations of the complaint.

In its opposition, plaintiff states that the investigation of the factual basis for this case had its inception in another case involving Danik. In *Intercontinental Apparel, Inc. v. Danik, Inc.*, No. 83-1579, also assigned to this Court, a Hartmarx subsidiary sued Danik for collection of $108,000 due for sale of menswear. Danik counterclaimed, alleging that Intercontinental had engaged in price discrimination in violation of the Robinson-Patman Act.[2]

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[1] The major metropolitan areas cited in the affidavits are New York City, Los Angeles/Long Beach, Chicago, Philadelphia, Detroit, Boston, Washington, D.C., San Francisco, Houston, Dallas, St. Louis, Nassau/Suffolk, New York, Atlanta, Pittsburgh, and Baltimore.

[2] The Court entered judgment for Intercontinental on its collection claim on March 21, 1984. Danik's counterclaim was tried to a jury, which returned a verdict in favor of Intercontinental on

Plaintiff's counsel states that, during discovery in No. 83-1579, he "became aware of the possible existence of an exclusive retail agent policy" for Hart, Schaffner and Marx and Hickey-Freeman suits because Danik had been unsuccessful in its attempts to purchase those lines of menswear. Investigation then led counsel to conclude, correctly, that these lines of menswear were sold only by one retailer in the Washington, D.C. area.

Accordingly, plaintiff's counsel instituted an investigation to determine whether there were exclusive retailing arrangements in other cities. The investigation consisted of telephone calls to retailers in four east coast cities by members of plaintiff's counsel's firm. A legal secretary placed calls to four retailers in New York City, spoke to salesmen, and was advised that the salesmen knew of only one store in the area that carried the Hart, Schaffner and Marx line of menswear. The secretary also contacted four retailers in Philadelphia, again spoke to salesmen, and was advised that the salesmen knew of only one store carrying the Hart, Schaffner and Marx line in that city. A lawyer in the firm telephoned several retailers in the Baltimore area and, after speaking to salesmen, was advised that they knew of only one retailer carrying Hart, Schaffner and Marx menswear. Additional calls were placed to retailers in the Washington, D.C. area.[3] Insofar as is established by the record, these telephone calls were the extent of plaintiff's investigation of theh factual basis for the complaint.

February 22, 1985. The court of appeals rejected Danik's appeal of that verdict on February 5, 1986. *Intercontinental Apparel, Inc. v. Danik, Inc.*, No. 85-5284 (D.C. Cir. Feb. 5, 1986).

[3] Affidavits submitted by defendants state that Hart, Schaffner and Marx menswear was distributed to three retailers in New York City, seven retailers in Philadelphia, two retailers in Baltimore, and one retailer in Washington, D.C. The affidavits also assert that Hickey-Freeman menswear was distributed to twenty retailers in New York City, three retailers in Philadelphia, one retailer in Baltimore, and one retailer in Washington, D.C.

Determination of whether an objectively reasonable pre-filing inquiry has been made will focus upon the circumstances of the case. *See Westmoreland*, 770 F.2d at 1177; *Duncan v. WJLA-TV, Inc.*, 106 F.R.D. 4, 6 (D.D.C. 1984). Factors to be considered include how much time for investigation was available to the signer of the pleading and whether counsel had to rely upon a client for information as to the facts underlying the pleading. *See* Advisory Committee Notes. The district court's determination is "accorded wide discretion" because the court "has tasted the flavor of the litigation and is in the best position to make these kinds of determinations." *Westmoreland*, 770 F.2d at 1174.

In this case, the conduct of plaintiff and its counsel presents a strong case for imposition of Rule 11 sanctions. Here plaintiff advanced serious allegations that defendants committed sweeping nationwide violations of antitrust laws. An objective review indicates that plaintiff's pre-filing inquiry into the facts underlying these allegations was grossly inadequate.

Plaintiff's case rested primarily upon the allegation that the defendants maintained exclusive retail agency agreements in every major metropolitan area in the United States. The inquiry into the factual basis for this claim consisted solely of plaintiff's own inability to purchase Hart, Schaffner and Marx and Hickey-Freeman clothing and telephone calls to clothing salesmen in a limited, randomly selected number of retail stores in four east coast cities. This investigation has two obvious deficiencies. First, it concentrated solely upon Hart, Schaffner and Marx menswear and thus in no way justified the claim of exclusive retail agency arrangements for Hickey-Freeman apparel. Second, it was limited to four eastern cities and consequently provides no support for the allegation that exclusive arrangements existed in *every* major metropolitan area.

In addition, counsel's random telephone investigation is far removed from the type of systematic inquiry

needed to conclude that allegations of the severity alleged by plaintiff are "well grounded in fact." Plaintiff's counsel contacted only a few retailers in cities where dozens of retailers were in business. Plaintiff sought the opinion of salesmen instead of management personnel who might have personal knowledge of the alleged exclusive retail agency policy. These flaws in plaintiff's investigation make it difficult to find a "reasonable inquiry" with respect to the exclusive retail agency allegations.

Even more telling is the absence of anything in the record to suggest that plaintiff made any investigation into its claims of illegal price-fixing, territorial restraints, or resale price maintenance. This lapse is of great significance because it is well established that exclusive retail agency policies, by themselves, are not per se violative of antitrust laws. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942 (6th Cir. 1983). Rather, exclusive retailing arrangements are analyzed by the "rule of reason," whereby the trier of fact weighs the circumstances of the case to determine whether the restrictive practice imposes an unreasonable restraint on competiiton. *See Continental T.V., Inc.*, 433 U.S. at 49. Thus, plaintiff was required to plead, and show, anticompetitive effects of the exclusive retail agency policy, such as price-fixing or resale price maintenance, in order to prevail. *See, e.g., Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705 (11th Cir. 1984) (per curiam); *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983). Thus, insofar as is shown in the record, plaintiff failed to make any investigation whatsoever into the factual basis for allegations that were necessary elements of a successful claim.

The evidence suggests that plaintiff conducted an objectively insufficient investigation into its claim of a

nationwide exclusive retail agency policy and no inquiry at all into other necessary elements of its case. In cases where the inquiry into the factual basis for a complaint has been similarly inadequate, courts have not hesitated to find Rule 11 violations. *See, e.g., City of Yonkers v. Otis Elevator Co.*, 106 F.R.D. 524 (S.D.N.Y. 1985); *Filippini v. Austin*, 106 F.R.D. 425 (C.D. Cal. 1985); *United Food and Commercial Workers v. Armour and Co.*, 106 F.R.D. 345 (N.D. Cal. 1985). *Cf. Wymer v. Lessin*, 109 F.R.D. 114 (D.D.C. 1985); *Weil v. Markowitz*, 108 F.R.D. 113 (D.D.C. 1985). There is nothing to suggest that the paucity of plaintiff's pre-filing inquiry was necessitated by time constraints, and Dashtara's deposition testimony reveals that plaintiff's counsel was not relying on the factual representations of the client. *See* Advisory Committee Notes.

Plaintiff's counsel does offer two circumstances which may be viewed as mitigating the inadequacy of the investigation. First, plaintiff notes the general rule that, "in antitrust cases, where 'the proof is largely in the hands of the alleged coconspirators,' *Poller v. Columbia Broadcasting*, 368 U.S. 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976). Thus, plaintiff argues, plaintiffs in antitrust cases should be held to a less stringent standard under Rule 11 because of the difficulty in discovering relevant facts prior to the filing of a complaint.

There are several responses to this argument. First, courts have noted that, even in complex antitrust cases, plaintiffs may not "rely[] on bare allegations coupled with the hope that something could be developed at trial to support those allegations." *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1496 (D.C. Cir. 1984). Indeed, the Supreme Court has refused to establish a rule "that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to

a full dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1967); *see also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Antitrust plaintiffs, therefore, are required to establish some factual basis for their claims, notwithstanding the discovery difficulties they may encounter.

Second, the cases cited by plaintiff all address the use of summary procedures to dispose of cases, and all predate the 1983 amendments to Rule 11. The only Rule 11 case cited by plaintiff in this context utilized the subjective test of the pre-1983 rule. *See In Re Mid-Atlantic Toyota Antitrust Litigation*, 525 F. Supp. 1265, 1282-83 (D. Md. 1981). As such, the cases cited by plaintiff have little relevance to the determination of whether a litigant has made a reasonable pre-filing inquiry into the factual basis for his antitrust claims.

Rule 11 obligates litigants and their counsel to examine the factual basis for their allegations and to "stop and think" before filing a pleading. *Duncan v. WJLA-TV, Inc.*, 106 F.R.D. at 6. As one court recently noted:

> Rule 11 is designed to insure that allegations made in a complaint . . . are supported by a sufficient factual predicate *at the time that the claims are asserted.* It is thus no answer to a motion seeking Rule 11 sanctions . . . to suggest that plaintiffs needed discovery to ascertain whether the claim asserted was well founded.

City of Yonkers v. Otis Elevator Co., 106 F.R.D. at 525 (emphasis in original); *see also Weil v. Markowitz*, 108 F.R.D. at 116. There is nothing to indicate that antitrust plaintiffs are exempted from conducting the reasonable pre-filing inquiry mandated by Rule 11.

The second mitigating circumstances cited by plaintiff involves communication between the parties prior to the filing of this case. Plaintiff's counsel contacted de-

fendants' counsel to advise them that Danik was contemplating filing this suit and sent copies of the complaint to defendants' counsel for their consideration. Plaintiff's counsel later discussed the case with defense counsel with the apparent intent of initiating settlement discussions as to the claims in this case and those in No. 83-1579. Defendants' counsel responded that they were not interested in such discussions and that, if plaintiff wanted to pursue its claims, it should file its complaint.

Plaintiff's counsel asserts that at no point during these pre-filing contacts did defendants' counsel expressly deny the factual allegations of the complaint. As such, plaintiff's counsel argues that the lack of a denial inferentially supported plaintiff's belief that its factual allegations were "well grounded in fact."

Research has uncovered no Rule 11 cases which involved similar circumstances. It may be argued that, by giving defendants a pre-filing opportunity to deny the factual allegations in the complaint, plaintiff was engaging in the type of careful investigation that Rule 11 requires. Several factors weigh against this conclusion, however. First, plaintiff's counsel apparently never asked defense counsel about the factual basis for the complaint; rather, plaintiff's sole purpose in forwarding the complaint evidently was to encourage settlement of all disputes between the parties. It, therefore, is difficult to construe defendants' failure to deny the factual allegations as an implicit acknowledgement of their truth. Second, plaintiff's counsel admitted during the oral argument of this motion that defendants had, in substance, previously denied similar allegations of antitrust violations. Indeed, plaintiff's counsel stated that, even had defendants expressly denied the factual allegations, he likely would not have believed them. Third, accepting plaintiff's argument could effectively shift the burden of compliance with Rule 11. In every case in which

advance notice of a lawsuit was provided, the party receiving such notice would be required to make point-by-point denials of the complaint's factual allegations or risk waiving the ability to seek Rule 11 sanctions. Neither the language nor the purpose of the 1983 amendments to Rule 11 supports such a result.

B. *Selection of Sanctions*

Because the Court concludes that Rule 11 has been violated, the imposition of sanctions is required. *See Westmoreland*, 770 F.2d at 1174-75. The selection of an appropriate sanction, however, is left to the discretion of the district court. *Id.* at 1178. Rule 11 provides for an award of expenses "incurred because of the filing of the pleading, motion, or other paper." Thus, courts typically require the party who has violated Rule 11 to compensate the opposing party for his attorneys' fees and costs related to responding to the improper pleading. *See Westmoreland*, 770 F.2d at 1178-79; *Eastway Construction Corp. v. City of New York*, 762 F.2d at 254 n.7; *Hudson v. Moore Business Forms, Inc.*, 609 F. Supp. 467, 484-85 (N.D. Cal. 1985).

The Court has carefully reviewed the detailed statement of attorney's fees and expenses submitted by defendants and concludes that the amount requested is excessive. From the outset of this case, defendants insisted that no foundation existed for plaintiff's allegations. Nevertheless, defendants' counsel launched a full-scale assault on all the legal issues raised by the complaint. Five attorneys and additional paralegals spend countless hours researching a variety of antitrust, class certification, Rule 11, and factual issues; however, the results of much of that research were not reasonably necessary to achieve dismissal of the case. Such a response was unreasonably disproportionate.

Particularly unreasonable were defendants' research efforts regarding class certification. While the issue

might ultimately have been presented for the Court's determination, defendants' insistence that plaintiff had failed to state a claim rendered the certification issue secondary. Legal efforts regarding that issue would have been appropriate only after plaintiff's complaint survived a 12(b)(6) challenge, which it did not.

In addition, the Court finds excessive the staffing of this case by defendants' counsel and the amount of research effort devoted to the Rule 11 issue and motion to dismiss. The repeated travels of one associate from Chicago to Washington seem especially unreasonable. This associate's many hours of research and writing on Rule 11 and the repeated review of his work by at least three other attorneys unjustifiably multiplied the amount of effort required to produce a superior brief on this issue.

For the reasons outlined above, the Court finds that an award of $32,103.78 is appropriate as a sanction for violation of Rule 11.

The sole remaining question is apportionment of the sanction. As plaintiff's counsel noted, plaintiff relied entirely on the advice of its attorneys in prosecuting this case. However, a party is not absolved of responsibility under Rule 11 simply because he is ignorant of the law. Danik authorized the prosecution of this lawsuit albeit on the advice of counsel and must assume some of the burden of sanctions. For this reason, counsel for Danik—the law firm of Cooter & Gell—will be assessed a sanction of $21,402.52 and Danik will be required to pay the remaining amount of $10,701.26. Because counsel for Hartmarx has already been paid its fees, the sanctions shall be paid directly to Hartmarx.

III. CONCLUSION

The Court concludes that, under the objective test used in assessing Rule 11 motions, plaintiff failed to make a "reasonable inquiry" into the factual allegations con-

tained in the complaint. The record establishes that plaintiff made an inadequate investigation of its claim that defendants maintained an exclusive retailer agency policy, and that plaintiff made no investigation into its claims of price-fixing, resale price maintenance, and other anticompetitive practices. While Danik's counsel is primarily responsible for this neglect, Danik authorized this lawsuit and must bear a portion of the sanction.

/s/ Oliver Gasch
OLIVER GASCH
United States District Judge

Date: Feb. 25th 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3568-OG

DANIK, INC.,
Plaintiff,

v.

HARTMARX CORPORATION, *et al.*,
Defendants.

ORDER

[Filed February 26, 1988]

Upon consideration of defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11, the oppositions thereto, and the record herein, and for the reasons stated in the accompanying memorandum, it is this 25th day of February, 1988

ORDERED that defendants' motion be, and hereby is, granted; and it is further

ORDERED that the law firm of Cooter & Gell shall forthwith pay to the Hartmarx Corporation Twenty-One Thousand Four Hundred Fifty-Two Dollars and Fifty-Two Cents ($21,452.52) as a sanction for violating Federal Rule of Civil Procedure 11; and it is further

ORDERED that Danik, Incorporated shall forthwith pay to the Hartmarx Corporation Ten Thousand Seven Hundred One Dollars and Twenty-Six Cents ($10,701.26) as a sanction for violating Federal Rule of Civil Procedure 11.

/s/ Oliver Gasch
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3568

DANIK, INC.,
Plaintiff,

v.

HARTMARX CORPORATION, *et al.*,
Defendants.

ORDER

[Filed December 2, 1987]

It appearing to the Court that defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11 is ripe for decision, it is by the Court this 1st day of December, 1987

ORDERED that defendants shall submit to the Court a statement of costs and attorneys' fees incurred in the captioned case on or before December 11, 1987.

/s/ Oliver Gasch
OLIVER GASCH
United States District Judge

Supreme Court, U.S.
FILED
SEP 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-275

In the Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL, PETITIONER

v.

HARTMARX CORPORATION, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, by voluntarily dismissing its complaint pursuant to Fed. R. Civ. P. 41(a)(1)(i), petitioner deprived the district court of jurisdiction to act on a motion for Rule 11 sanctions that was filed before the voluntary dismissal.

2. Whether the court of appeals, which determined that petitioner's admitted failure to conduct any inquiry with respect to fundamental allegations of the complaint was unreasonable under the circumstances of this case, applied an improper standard in reviewing the district court's decision that Rule 11 had been violated.

3. Whether the district court abused its discretion in finding that petitioner violated Rule 11 by filing a complaint that had no reasonable basis in fact or in imposing a sanction of $21,402.52 against petitioner.

4. Whether the court of appeals correctly determined that the district court should award respondents attorney's fees reasonably incurred in successfully defending against petitioner's appeal of the Rule 11 judgment.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

In addition to respondent Hartmarx Corporation, respondents include two wholly-owned subsidiaries of Hartmarx Corporation, Hart, Schaffner & Marx and Hickey-Freeman Co., Inc. Hartmarx Corporation has no parent companies, affiliates or subsidiaries (except wholly-owned subsidiaries).

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STATEMENT OF THE CASE

The district court imposed Rule 11 sanctions in this case because petitioner Cooter & Gell failed to conduct an adequate pre-filing inquiry into the factual basis for the allegations contained in an antitrust lawsuit filed against respondents Hartmarx Corporation, Hart, Schaffner & Marx and Hickey-Freeman Co., Inc. The reprimand followed years of related litigation between a Cooter & Gell client and Hartmarx and its subsidiaries. During those years, Cooter & Gell initiated four separate antitrust actions against various Hartmarx companies, none of

which resulted in a finding that Hartmarx or any of its subsidiaries had violated the antitrust laws. As the district court observed, it had "tasted the flavor of the litigation" and was "in the best position" to determine whether, as Rule 11 requires, Cooter & Gell had performed a reasonable investigation into the factual basis for its client's complaint in this case. Pet. App. 23a. A unanimous court of appeals found "no difficulty in affirming liability under Rule 11 here." *Id.* at 11a. Because the petition fails to afford the Court a fair view of the conduct that led to the imposition of Rule 11 sanctions, a brief summary of the record follows.

A. The Repeated Antitrust Suits Against Hartmarx and Its Subsidiaries

Petitioner Cooter & Gell is a law firm based in Washington, D.C. Respondent Hartmarx is a holding company that manufactures and distributes men's clothing across the United States through various subsidiaries, including respondents Hickey-Freeman and Hart, Schaffner & Marx. For approximately three years, petitioner represented a Washington area clothing retailer, Danik, Inc., in four antitrust actions brought against Hartmarx and five Hartmarx affiliates.

The flurry of antitrust litigation followed in the wake of a breach of contract action against Danik by Hartmarx's subsidiary, Intercontinental Apparel, Inc. Intercontinental alleged that Danik had failed to pay for approximately $100,000 of merchandise. Cooter & Gell, on behalf of Danik, filed a counterclaim alleging that Intercontinental had engaged in price discrimination in violation of the Robinson-Patman Act. In March 1984, the district court

granted Intercontinental summary judgment on its breach of contract claim, and that judgment was affirmed on appeal. In February 1985, a jury returned a verdict for Intercontinental on Danik's Robinson-Patman Act counterclaim. The court of appeals again affirmed. Pet. App. 2a.

In November 1983, while the litigation described above was proceeding in district court, Cooter & Gell prepared two different class action complaints against Hartmarx and several of its subsidiaries. Pet. App. 2a-3a. Cooter & Gell presented drafts of those complaints to counsel for Hartmarx and promised to file both lawsuits unless the breach of contract action against Danik was settled on terms that resulted in a payment to Danik. *Id.* at 3a. Cooter & Gell's lead attorney recounted his ultimatum in an affidavit filed in the district court (C.A. App. 183) [1]:

> I made clear at that meeting * * * with counsel for [Hartmarx], that it was not my intention to simply "wash out" the collection with my forebearance in filing these class actions. I stated to counsel that I felt that [Hartmarx] faced more exposure from these class actions than did my client in the underlying collection suit, and that it was my intention to give [Hartmarx] an opportunity to consider settlement of the class action suits prior to the certification of the class actions, after which time I would no longer be able to engage in settlement discussions on my client's behalf alone.

Hartmarx rejected Danik's "settlement offer" and, true to its word, Cooter & Gell filed the two class ac-

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[1] "C.A. App." refers to the joint appendix submitted to the court of appeals.

tion complaints. Pet. App. 3a. Both lawsuits were assigned to Judge Oliver Gasch, who was presiding over the original breach of contract/Robinson-Patman Act litigation. Thus, at the end of 1983, Cooter & Gell was representing Danik against Hartmarx and its affiliates in three separate lawsuits before the same district judge.[2] Danik voluntarily dismissed both class actions (prior to class certification) at the end of April 1984. See C.A. App. 3.

In September 1984, Cooter & Gell filed yet another antitrust action against three Hartmarx subsidiaries and an unrelated clothing retailer in the United States District Court for the District of Maryland. The Maryland court granted Hartmarx's motion to transfer the action to Judge Gasch on the ground that the issues raised in the complaint were identical or substantially identical to the issues in the antitrust lawsuits described above. The action was then stayed pending final resolution of the original breach of contract/Robinson-Patman Act litigation and was ultimately dismissed voluntarily in July 1986.

B. Cooter & Gell's Pre-Filing Inquiry In This Case

The complaint that gave rise to the district court's ruling that Cooter & Gell violated Rule 11 was one of the two class action complaints filed in November

[2] In its petition, Cooter & Gell refers to only one of the two class action complaints it filed against Hartmarx—the complaint that resulted in Rule 11 sanctions. Petitioner's statement that, in late 1983, "Danik had two antitrust actions pending in the district court against Hartmarx Corporation and its subsidiaries" (Pet. 4) is therefore incorrect. As described above, there were three antitrust actions pending at that time (the two class actions and the Robinson-Patman Act counterclaim).

1983. That complaint alleged that Hartmarx was engaged in a massive nationwide antitrust conspiracy involving price-fixing, resale price maintenance, territorial exclusivity, and other "unfair competition practices." Pet. App. 20a. The factual premise of the entire complaint was the allegation that Hartmarx sold Hart, Schaffner & Marx and Hickey-Freeman suits to only "one retailer in each major metropolitan area in the United States." *Id.* at 19a. The complaint was signed by two attorneys from Cooter & Gell and was verified by Danik's president and principal owner.

Apart from the fact that exclusive dealerships are a common method of distributorship in a variety of industries and are perfectly legal under federal antitrust laws, the allegations that Hartmarx systematically employed exclusive dealers was completely false. Affidavits from Hart, Schaffner & Marx and Hickey-Freeman executives filed with respondents' motion to dismiss the complaint demonstrated that "Hart, Schaffner and Marx suits are distributed to more than one retailer in each of fifteen major metropolitan areas save Washington, D.C.," and that "except in Washington, D.C. and Baltimore, Maryland, Hickey-Freeman suits are sold to more than one retailer in each of the same fifteen major metropolitan areas." Pet. App. 21a. "Indeed, these executives reported that each brand was sold to as many as 20 different retailers in some markets." *Id.* at 4a. The affidavits further established that neither Hart, Schaffner & Marx nor Hickey-Freeman had exclusive dealership agreements with any of their respective retailers. *Id.* at 21a.

Five days after moving to dismiss the complaint, Hartmarx moved for sanctions under Rule 11. In

opposing the Rule 11 motion, Cooter & Gell submitted two affidavits that described the firm's pre-filing inquiry. Pet. App. 4a. In addition, counsel for Hartmarx (over the objections of Cooter & Gell) took the deposition of the Danik officer who had verified the complaint and inquired into what facts he knew that supported his verification. As the district court found, the officer "stated that he relied wholly upon the representations of [Cooter & Gell] and conducted no independent review of the factual allegations of the complaint." Pet. App. 21a. In other words, this case does not involve a situation where an attorney relied on the misguided assertions of a client in drafting the factual allegations of a complaint and was then confronted with Rule 11 proceedings. Just the opposite is true; petitioner presented its client with unfounded accusations against Hartmarx and the client then signed off on those accusations.

According to the Cooter & Gell affidavits, at some time after the original breach of contract litigation began, the firm "became aware of the possible existence of an exclusive retail agent policy" whereby Hartmarx sold its Hart, Schaffner & Marx and Hickey-Freeman lines of men's suits through one exclusive retail agent in Washington, D.C. Pet. App. 22a. Cooter & Gell's "aware[ness]" of the "possible existence" of such a policy was based solely on the fact that only one retailer (Raleighs) sold these lines of menswear in the Washington area and that, according to unnamed principals at Danik, Danik had been unable to purchase such menswear from Hartmarx. *Ibid.* Wishing to turn this speculation into a cause of action, Cooter & Gell initiated an investigation into the existence of a nationwide exclusive

agency and price maintenance policy in the sale of men's suits under the Hart, Schaffner & Marx and Hickey-Freeman labels. That investigation began and ended with a series of telephone calls to salesmen at a few randomly selected clothiers in Washington, D.C., Baltimore, Philadelphia and New York. *Id.* at 4a, 22a.

In each of those calls, which were placed either by an attorney or a secretary at Cooter & Gell, the salesman purportedly said that he knew of only one retailer in his city that sold Hart, Schaffner & Marx suits. Pet. App. 22a. In none of the calls did the salesman say anything to suggest that the lack of additional Hart, Schaffner & Marx outlets was the result of an exclusive dealer policy. Moreover, in none of the calls was the salesman asked anything about the number of Hickey-Freeman outlets in his city; in none was he asked anything about a refusal by Hartmarx to deal with any retailers; in none was he asked about any restrictions on the territory in which Hartmarx authorized its retailers to sell its products; and in none was he asked anything about the prices at which Hart, Schaffner & Marx or Hickey-Freeman suits were sold in his city. *Id.* at 5a, 24a-25a. Despite its desire to establish that Hartmarx had an anticompetitive policy of nationwide scope, Cooter & Gell made no phone calls to retailers outside Washington, Baltimore, Philadelphia and New York. *Id.* at 5a, 22a-23a.

After it obtained the Hart, Schaffner & Marx and Hickey-Freeman affidavits that gave the lie to the allegations of the complaint, Cooter & Gell might have acknowledged its error and withdrawn the complaint. Instead, the law firm chose to conduct an additional

"investigation." It consisted of a review of telephone directories in various major cities and additional phone calls to salesmen, asking whether Hartmarx had "an exclusive retailer agent policy" for the sale of Hart, Schaffner & Marx and Hickey-Freeman suits. Even that skimpy investigation revealed that multiple retailers existed for Hartmarx menswear in Los Angeles, Boston and Philadelphia, one of the four cities encompassed by Cooter & Gell's original investigation.[3] Despite confirming what the Hart, Schaffner & Marx and Hickey-Freeman affidavits had established—that the fundamental factual premise of the complaint was wrong—Cooter & Gell and its client opposed Hartmarx's motion to dismiss (and, of course, the Rule 11 motion). Litigation of the unfounded claims contained in the complaint continued for three months before the complaint was voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(i).

C. The Decision of the District Court

Six weeks after the complaint was voluntarily dismissed, the district court held a hearing on the Rule 11 motion. In December 1987, the court ordered Hartmarx to submit a statement of costs and attorney's fees. Cooter & Gell and Danik (now represented by other counsel) separately filed objections to the fee request and reiterated their arguments as to why the court should deny the Rule 11 motion. In February 1988, the court granted the motion, holding that the "pre-filing inquiry into the facts underlying these allegations was grossly inadequate." Pet. App. 23a. The court awarded Hartmarx a total of

[3] Cooter & Gell's post-filing inquiry is described in an affidavit contained at C.A. App. 146-150.

$32,103.78 in costs and attorney's fees.[4] It assessed two-thirds of the award ($21,402.52) against Cooter & Gell and the remainder ($10,701.26) against Danik. *Id.* at 29a.

With respect to the claim that Hartmarx maintained exclusive agreements with one retailer in every major metropolitan area in the United States, the district court found two "obvious deficiencies" in Cooter & Gell's pre-filing inquiry. Pet. App. 23a. "First, it concentrated solely upon Hart, Schaffner & Marx menswear and thus in no way justified the claim of exclusive retail agency arrangements for Hickey-Freeman apparel. Second, it was limited to four eastern cities and consequently provides no support for the allegation that exclusive arrangements existed in *every* major metropolitan area." *Ibid.* (emphasis in original). In addition, the court took Cooter & Gell to task for the meager nature of its investigation within those four cities. Specifically, the law firm "contacted only a few retailers in cities where dozens of retailers were in business" and directed its telephone calls to salesmen, without attempting to contact "management personnel who might have personal knowledge of the alleged exclusive retail agency policy." *Id.* at 24a.

The district court also pointed out that, even if Hartmarx had been party to exclusive dealing agreements, such agreements "by themselves, are not per se violations of antitrust laws." Pet. App. 24a. Exclusive dealing arrangements are analyzed under the "rule of reason" and can give rise to liability only if an antitrust plaintiff is able "to plead, and show,

[4] Hartmarx had submitted a verified fee request showing attorney's fees and costs totalling $61,917.99.

anticompetitive effects" flowing from the arrangements. *Ibid.* The court found that Cooter & Gell "failed to make any investigation whatsoever into the factual basis" for a claim that Hartmarx's distribution policies had brought about the anticompetitive effects necessary to prove an antitrust violation. *Ibid.*

D. The Decision of the Court of Appeals

On appeal, Cooter & Gell argued for the first time that the voluntary dismissal of Danik's complaint had stripped the district court of jurisdiction to rule on Hartmarx's Rule 11 motion.[5] The court of appeals rejected that argument, explaining:

> Rule 11 sanctions * * * are * * * meant to deter the filing of unfounded pleadings, which is an abuse of the judicial process. As in criminal contempt, the court has an interest in deterring such conduct independent of the burdened party's interest in recovering its expenses. Accordingly, a court may award Rule 11 sanctions or issue a contempt citation *sua sponte*. * * * In revelant respects, therefore, Rule 11 is analogous to criminal contempt; the systemic interest in its proper functioning requires that it be available in appropriate circumstances notwithstanding a private party's effort to cut its losses and run out of court, using Rule 41 as an emergency exit.

Pet. App. 9a-10a.

The court of appeals also reviewed the record that established Cooter & Gell's liability under Rule 11.

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[5] Danik separately appealed the Rule 11 judgment against it, but that appeal was dismissed for failure to prosecute. Pet. App. 2a.

Like the district court, it accepted Cooter & Gell's own "account of their efforts" prior to filing the complaint. Pet. App. 11a. And that account was enough to demonstrate the law firm's liability to Hartmarx: "It is impossible to see how 'no inquiry' could be a 'reasonable inquiry' with regard to the Hickey-Freeman allegation or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere." *Ibid.* Because those deficiencies went "to the heart of the complaint," the court below found it unnecessary to consider whether Rule 11 was violated by Cooter & Gell's failure to inquire into the anticompetitive effects essential to a rule of reason claim. *Id.* at 13a.

In addition, the court of appeals rejected Cooter & Gell's contention that the district court abused its discretion in setting the amount of the sanction. Inasmuch as the sanction totalled only about one-half of "the costs and attorney's fees incurred by [Hartmarx]" as a result of the baseless complaint, the court of appeals saw no reason to "justify our finding [the district court's] decision an abuse of discretion." Pet. App. 13a-14a.

Finally, the court of appeals agreed with Hartmarx that it was entitled to return to the district court and request an additional award for attorney's fees reasonably incurred in defending the Rule 11 award on appeal. Borrowing from its earlier decision in *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985), the court noted that "[i]t is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many litigants in [Hartmarx's] position to conclude that the vindication of the Rule 11 interests is not worth the

candle." Pet. App. 14a. Accordingly, the court of appeals remanded the case to the district court for the limited purpose of determining the amount of additional fees due Hartmarx. *Id.* at 16a.

REASONS FOR DENYING THE PETITION

This case involves petitioner's blatant violation of Rule 11 of the Federal Rules of Civil Procedure. Rule 11 clearly requires that every pleading must "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry" be "well grounded in fact," and it forbids pleadings to be "interposed for any improper purpose." Both lower courts, after a careful review of the record, agreed that petitioner filed a lawsuit charging respondents with serious antitrust violations without making even the slightest genuine effort to determine whether the allegations in the complaint had any basis in fact. And both lower courts further agreed that petitioner attempted to employ its baseless complaint as a device to extract a favorable settlement from Hartmarx in a separate lawsuit that petitioner was doomed to lose. As a result of petitioner's wholesale disregard of Rule 11, respondents were forced to incur substantial legal costs. The Rule 11 award in this case compensates respondents for part of those costs.

There is no reason why this Court should allow petitioner yet another opportunity to attempt to justify its unprofessional conduct, thereby imposing further unnecessary burdens and expense on respondents. As we explain below, the decision of the court of appeals is plainly correct, and further review is unwarranted.

1. Petitioner contends (Pet. 8-12) that the circuits are split on the issue of whether a plaintiff (and its counsel) can avoid Rule 11 sanctions for filing a baseless complaint by voluntarily dismissing the lawsuit pursuant to Fed. R. Civ. P. 41(a)(1)(i). The Second Circuit has held that a voluntary dismissal does divest the district court of jurisdiction to impose Rule 11 sanctions for conduct occurring prior to the dismissal. *Johnson Chem. Co.* v. *Home Care Prods., Inc.*, 823 F.2d 28, 30-31 (2d Cir. 1987).[6] The court below and four other circuits have taken the contrary view. See Pet. App. 6a-10a; *Muthig* v. *Brant Point Nantucket, Inc.*, 838 F.2d 600, 603-604 (1st Cir. 1988); *Greenberg* v. *Sala*, 822 F.2d 882, 885 (9th Cir. 1987); *Szabo Food Serv., Inc.* v. *Canteen Corp.*, 823 F.2d 1073, 1076-1079 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1101 (1988); *Kurkowski* v. *Volcker*, 819 F.2d 201, 203 (8th Cir. 1987).

The Second Circuit's decision in *Johnson*, however, is plainly distinguishable from the present case because it involved a motion for Rule 11 sanctions filed *after* the case had been voluntarily dismissed. See 823 F.2d at 30. Here, Hartmarx filed its motion *be-*

[6] Contrary to petitioner's contention, the Fifth Circuit has not held that a Rule 41(a)(1)(i) dismissal deprives the district court of jurisdiction to impose Rule 11 sanctions for pre-dismissal violations. *Carter* v. *United States*, 547 F.2d 258 (5th Cir. 1977), merely holds that the courts have no power to decide a case on the merits once a plaintiff has filed a Rule 41(a)(1)(i) notice of dismissal. It says nothing about the court's power to impose Rule 11 sanctions after a dismissal. *Williams* v. *Ezell*, 531 F.2d 1261 (5th Cir. 1976), held that the district court lacked power to award defendants attorney's fees after a voluntary dismissal, but nothing in the opinion indicates that the attorney's fees had been awarded for a Rule 11 violation. In short, the court below was correct in leaving the Fifth Circuit off the list of "circuits that have confronted this issue." Pet. App. 6a.

fore Danik's lawsuit was voluntarily dismissed. There may be some basis for a rule that would deprive the district court of jurisdiction over a Rule 11 motion filed after it no longer has jurisdiction over the merits but not over a similar motion filed before it loses jurisdiction over the merits. Indeed, the Eighth Circuit has expressly adopted this distinction. See *Kurkowski*, 819 F.2d at 203 n.7. Because *no* court has yet held that a district court loses jurisdiction in a case like this one, in which the Rule 11 motion preceded the voluntary dismissal, this case does not involve a true conflict.

In any event, certiorari is not warranted even if the Second Circuit is out of step with five of its sister circuits. The Second Circuit decided *Johnson* prior to the First Circuit decision in *Muthig* and the Ninth Circuit decision in *Greenberg* and only eight days after the Seventh Circuit decision in *Szabo*. It therefore did not have the benefit of the thoughtful analyses of those courts. Nor, of course, did it have the benefit of the reasoning of the court below.[7] Lacking any guidance from other courts, the *Johnson* panel assumed without discussion that a voluntary dismissal deprives the district court of "all jurisdiction over the action," and it accordingly concluded that the district court necessarily lacked jurisdiction to impose Rule 11 sanctions even for pre-dismissal conduct.[8] 823 F.2d at 31. If the Second Circuit had had

[7] The Eighth Circuit decided *Kurkowski* a month and a half earlier, but the Second Circuit apparently was unaware of it.

[8] The *Johnson* panel relied principally on the Second Circuit's earlier decision in *Santiago* v. *Victim Servs. Agency*, 753 F.2d 219 (2d Cir. 1985), a case that had nothing to do with Rule 11. In *Santiago*, civil rights plaintiffs voluntarily dismissed their claims under Rule 41(a)(1)(i), and the district court awarded attorney's fees to the defendants pursuant to 42 U.S.C. § 1988, which allows for fee awards to prevailing parties in civil rights actions. 753 F.2d at 220. *Santiago*, therefore, stands solely for the unremarkable proposition that a Rule 41(a)(1)(i) voluntary dismissal precludes a subsequent determination that the defendant is a "prevailing party" for purposes of Section 1988. "The court's inability to award fees under § 1988 does not imply the same treatment of its authority under Rule 11. Neither 'prevailing' on the merits nor an entitlement to 'costs' is a necessary condition of a Rule 11 award." *Szabo*, 823 F.2d at 1077 (discussing *Santiago*).

the benefit of the thorough analyses of the D.C., First, and Seventh Circuits, it undoubtedly would have recognized that its premise was wrong. As the Seventh Circuit observed, " '[j]urisdiction' is an all-purpose word denoting adjudicatory power. A court may have power to do some things but not others, and the use of 'lack of jurisdiction' to describe the things it may not do does not mean that the court is out of business." *Szabo*, 823 F.2d at 1077. Taken to its logical conclusion, the Second Circuit's reasoning would deprive a court of power to punish a blatant contempt that occurs just seconds before a voluntary dismissal, a manifestly absurd result. *Id.* at 1079.

The Second Circuit also failed to take into account the important policies underlying Rule 11. As the court below cogently explained:

> [T]he policies behind Rule 11 do not permit a party to escape its sanction by merely dismissing an unfounded case. The benefits to such a dismissal would accrue to precisely those plaintiffs for which Rule 11 intends "punishment and deterrence," while the costs Rule 11 is designed to

> shift would remain with the defendant upon whom the plaintiff unfairly thrust them.
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> * * * * *
>
> If a party could immunize itself from a meritorious Rule 11 motion by voluntarily dismissing its case, the risks associated with the filing of an inadequately investigated complaint would be significantly diminished; and as the price of such misconduct fell, of course, its frequency would rise.

Pet. App. 7a-8a (citation omitted).

Nor are there any countervailing policy reasons that might justify the Second Circuit's decision. Petitioner asserts (Pet. 10-11) that allowing courts to impose sanctions after a voluntary dismissal somehow hinders "the unfettered power of a plaintiff" to dismiss its case voluntarily, but it does not explain why that is so. If anything, Rule 11 provides a strong economic incentive for those who file baseless complaints to avail themselves of Rule 41(a)(1)(i): the sooner they terminate their cases and stop imposing litigation costs on their opponents, the lower Rule 11 sanctions are likely to be. See *Szabo*, 823 F.2d at 1079. Petitioner also asserts (Pet. 11), as it did in the court below, that a ruling permitting courts to impose Rule 11 sanctions after a voluntary dismissal will result in a "multiplicity of assaults on Rule 41." The court of appeals rejected this contention, stating: "Appellants do not identify any such possible [attacks], * * * and we can foresee none." Pet. App. 8a. Despite this dismissal of petitioner's unfounded suggestion that Rule 41 is in danger, petitioner to this day fails to provide even one example of how Rule 41 is threatened by the holdings

of the D.C., First, Seventh, Eighth, and Ninth Circuits.

In sum, *Johnson* is an ill-considered and unsupported decision that stands alone. Now that five courts of appeals have rejected it, there is little risk that the circuits will be in disarray.[9] It is more likely that the Second Circuit will revisit the issue in light of the rulings of these other courts. Indeed, that court already has begun the process of disavowing *Johnson* by strongly implying that it is limited to voluntary dismissals under Rule 41(a)(1)(i) and has no bearing on stipulated dismissals under Rule 41(a)(1)(ii). See *Barr Laboratories, Inc.* v. *Abbott Laboratories*, 867 F.2d 743, 747-748 (2d Cir. 1989); *id.* at 749 (Altimari, J., concurring).[10] In *Barr*, the court suggested that a stipulated dismissal might not deprive a court of jurisdiction to impose Rule 11 sanc-

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[9] Both before and after *Johnson*, courts in the other circuits have shown no inclination to reach a similar result. See, *e.g.*, *Smith* v. *Phillips*, No. 89-6056 (10th Cir. Aug. 2, 1989) (1989 U.S. App. LEXIS 11047) ("A court may have jurisdiction to order Rule 11 sanctions for conduct that occurred before a case was dismissed") (dictum); *Short* v. *Weinrebe*, No. 87-5057 (E.D. Pa. June 30, 1988) (1988 U.S. Dist. LEXIS 6515) ("nowhere in the Rules is it suggested that a voluntary dismissal will terminate a motion for sanctions under Rule 11 or any other Rule"); *Balfour Guthrie, Inc.* v. *Hunter Marine Transp., Inc.*, 118 F.R.D. 66, 78 (M.D. Tenn. 1987) ("Even if voluntary dismissal had occurred, this would not prevent this Court from imposing sanctions under Rule 11") (dictum).

[10] See also *Connecticut* v. *Insurance Co. of America*, 121 F.R.D. 159, 161-162 (D. Conn. 1988) (despite the reasoning in *Johnson*, a court does not lack jurisdiction to impose Rule 11 sanctions on a defendant that has improperly removed a case from state court even though it lacks jurisdiction over the merits of that case).

tions even though it would deprive the court of jurisdiction to decide the merits. The *Barr* panel thus essentially rejected *Johnson*'s assumption that a voluntary dismissal causes a court to lose "all jurisdiction over the action." See Pet. App. 7a. It is apparently only a matter of time before the Second Circuit realizes that *Johnson* is unsound even for voluntary dismissals. Accordingly, there is no need for this Court to intervene now merely to correct an anomalous decision of a circuit that likely will soon correct itself.

2. Petitioner claims (Pet. 12-16) that the decision of the court of appeals conflicts with decisions of the Ninth and Sixth Circuits holding that the standard for determining whether an antitrust complaint has a reasonable basis in fact and law is lower than the standard that would apply in other kinds of cases. Petitioner is mistaken.

The Sixth Circuit case upon which petitioner relies says nothing about whether Rule 11 requires a different standard in antitrust cases. It merely holds that the district court did not abuse its discretion in finding "under the circumstances" that the plaintiff's pre-filing inquiry was reasonable. See *D & M Orthotics & Prosthetics, Inc.* v. *Sisters of Mercy Health Corp.*, No. 88-1945 (6th Cir. June 5, 1989) (1989 U.S. App. LEXIS 7865).

The Ninth Circuit did state that a more lenient standard should apply in those antitrust cases in which "the alleged conspirators control the proof." *Community Elec. Serv., Inc.* v. *National Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235, 1246 (9th Cir. 1989). But this is merely a restatement of the universal rule that courts must consider all of the circumstances in assessing the reasonableness of a pre-

filing inquiry. Far from conflicting with this rule, the court below agreed completely, stating that "disparate access to the information necessary for a putative plaintiff to determine the viability of its prospective cause of action is relevant to the inquiry called for in Rule 11." Pet. App. 12a. It went on to explain—quite sensibly—that "[i]t simply does not follow * * * that a plaintiff can be excused altogether from the need to make a 'reasonable inquiry' into the facts it alleges; rather, the disparate access point goes to the question of what is reasonable given the nature of the information to be obtained." *Ibid.*

Applying these principles, the court of appeals concluded that petitioner's pre-filing inquiry was wholly inadequate, given the information that was readily available, such as a toll-free telephone number that customers could call to learn the names and locations of Hart, Schaffner & Marx and Hickey-Freeman distributors in their area. Pet. App. 12a. Petitioner can quibble with this conclusion, but that quibble has no importance beyond this case. Therefore, there is no reason for this Court to review the issue.

Petitioner further contends (Pet. 16-18) that the circuits have split on the standard for reviewing findings of Rule 11 violations. But the correct standard simply is not relevant to this case. Contrary to petitioner's veiled suggestion (Pet. 16-17), the court of appeals did not state that it was applying an abuse of discretion standard for reviewing the district court's conclusion that petitioner's pre-filing inquiry violated Rule 11. Petitioner's violation of the requirement that complaints have a reasonable factual basis was so clear that the court did not have to rely on an abuse of discretion standard to affirm the district court. The court's ruling makes this plain:

> We find no difficulty in affirming liability under Rule 11 here, as none of the appellants' arguments calls into doubt the "two obvious deficiencies" that the district court identified in their pre-filing investigation of the facts: specifically, appellants failed to engage in any inquiry whatsoever concerning the allegations against [Hickey-Freeman] (as distinguished from [Hart, Schaffner & Marx]), and they claimed a nationwide conspiracy between defendants and selected merchants in each metropolitan area after polling merchants in only four eastern cities. Appellants' account of their efforts does no more than confirm these shortcomings[.] * * * It is impossible to see how "no inquiry" could be a "reasonable inquiry" with regard to the [Hickey-Freeman] allegation or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere.

Pet. App. 11a. Because petitioner's investigation would be deemed inadequate under *any* standard of review, this is not an appropriate case for the Court to consider imposing a uniform standard.

3. Petitioner requests (Pet. 14) that this Court decide whether the district court abused its discretion in imposing Rule 11 sanctions in this case. As demonstrated above, there was more than ample evidence in the record to support a finding that petitioner violated Rule 11 by failing to make a reasonable pre-filing inquiry. And, in any event, it is not this Court's normal practice to review findings of fact concurred in by both lower courts. See *NCAA* v. *Board of Regents*, 468 U.S. 85, 98 n.15 (1984).

Similarly, there is no reason for this Court to consider petitioner's argument, relegated to a footnote

(Pet. 15 n.7), that the district court erred in awarding $32,103.78 in sanctions. As petitioner conceded below (Pet. App. 13a), setting the penalty for a Rule 11 violation is a matter committed to the discretion of the district court. Here, the amount awarded was approximately half of the attorney's fees and costs incurred by Hartmarx in defending against petitioner's frivolous class action complaint. Moreover, only $21,402.52 of the sanction was imposed on petitioner, with petitioner's client responsible for the remainder. *Id.* at 29a.

4. Finally, petitioner contends (Pet. 18-20) that the circuits are in disagreement on the issue of whether a Rule 11 award should include legal fees incurred in defending that award on appeal. The D.C., First, and Seventh Circuits have held that appellate fees are incurred "because of" the Rule 11 violation and therefore properly constitute part of any award of attorney's fees. See Pet. App. 14a-16a; *Hays* v. *Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988); *Muthig*, 838 F.2d at 607. On the other hand, the Fourth and Ninth Circuits have held that appellate fees are recoverable only if the appeal from Rule 11 sanctions is itself frivolous. See *Orange Production Credit Ass'n* v. *Frontline Ventures, Ltd.*, 801 F.2d 1581 (9th Cir. 1986); *Basch* v. *Westinghouse Elec. Corp.*, 777 F.2d 165, 175 (4th Cir. 1985), cert. denied, 476 U.S. 1108 (1986).

As with the first issue raised by petitioner, however, the mere existence of a circuit split does not justify this Court's review. Because the decision of the court of appeals is plainly correct, further review would have no effect on the outcome of this case. Unless an award of attorney's fees is held to include

fees reasonably incurred in defending that award on appeal, litigants that have been victimized by Rule 11 violations will have inadequate incentive to incur the often significant expenditure of filing an appellate brief and undertaking an appellate argument merely to defend what may be a comparatively nominal sanction. Furthermore, the possibility that a Rule 11 violator could erode the opposing party's award of attorney's fees merely by taking an insubstantial yet non-frivolous appeal may act as a disincentive to the filing of a Rule 11 motion in the first place.[11] See *Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 475 (7th Cir. 1984) ("Requiring a party to bear [appellate] costs [incurred in defending an award of sanctions pursuant to Fed. R. Civ. P. 37] could offset substantially the very award that the party has obtained. This would create a disincentive for seeking sanctions in the first place * * *."). This plainly is contrary to the salutary purposes of the Rule. As the D.C. Circuit said when it first considered this issue four years ago:

> It is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many litigants * * * to conclude that the vindication of the Rule 11 interest is not worth the candle. Unquestionably, this would undermine the purposes behind Rule 11. Rule 11 is specifically designed to deter groundless litigation tactics and stem needless litigation costs to courts and counsel. Given this, we find it hard to believe that the drafters of the

[11] The incentive to pursue insubstantial appeals will be especially strong in cases like this one in which the party that violated Rule 11 is a law firm that can pursue an appeal without incurring out-of-pocket attorney's fees.

> rule intended [litigants] to bear their own appellate costs necessary to correct the error of [their adversaries'] ways.

Westmoreland v. *CBS, Inc.*, 770 F.2d 1168, 1179 (D.C. Cir. 1985) (citation omitted). The Seventh Circuit recently made the same point. See *Hays*, 847 F.2d at 419 ("to the extent that a party reasonably incurs substantial fees merely to defend [a Rule 11] award, yet cannot recover its expense, the deterrent and compensatory objectives of awarding sanctions are thwarted").

In contrast with this sound reasoning grounded in the policies of Rule 11, the Fourth and Ninth Circuits have provided no plausible explanation for their holdings. The Ninth Circuit has said only that if it were to accept the argument that has prevailed in the D.C., First, and Seventh Circuits, "every appellee who succeeded in preserving a favorable trial court award in a Rule 11 case would be entitled to fees on appeal regardless of the substance of the appeal. We do not perceive this to be the law." *Orange Production*, 801 F.2d at 1582. The Fourth Circuit has provided even less insight. Without even alluding to Rule 11 or the policies it is designed to further, that court merely rebuffed a request for appellate fees by stating that "[t]he present case * * * does not present an appropriate occasion to penalize counsel for having taken an appeal from the district court's sanction. [The] appeal, although found to be without merit, was not frivolous nor was it interposed to harass defendant or to delay implementation of a valid discovery order." *Basch*, 777 F.2d at 175.

Not only is the result reached by the court below far better reasoned than the result reached by the

Fourth and Ninth Circuits, it is consistent with decisions in analogous contexts. See, *e.g.*, *Tamari*, 729 F.2d at 475 (litigants that successfully defend sanctions awarded pursuant to Fed. R. Civ. P. 37 are entitled to their appellate attorney's fees); *In re Pine*, 705 F.2d 936, 939 (7th Cir. 1983) (award of attorney's fees pursuant to Truth in Lending Act's fee shifting provision includes appellate fees incurred in litigating adequacy of award); *Jones* v. *MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239 (8th Cir. 1982) (becoming the ninth court of appeals (of nine to consider the issue) to hold that an award under the Civil Rights Attorney's Fees Award Act (42 U.S.C. § 1988) necessarily includes fees incurred in obtaining and defending the award); *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42, 62 (D.C. Cir. 1982) (award of attorney's fees pursuant to the Toxic Substance Control Act's fee shifting provision includes fees incurred in preparing and defending the fee petition); see also *Schauffler* v. *United Ass'n of Journeymen & Apprentices*, 246 F.2d 867, 870 (3d Cir. 1957) (district court has discretion to include in penalty for civil contempt the attorney's fees incurred in defending the finding of contempt on appeal).

Thus, as the Seventh Circuit has said:

> Rule 11 is a fee-shifting statute, and a uniform body of law has grown up about such statutes entitling a party who successfully invokes the statute to obtain reasonable fees in defending the award on appeal. There is no reason to complicate this body of law by making an exception for Rule 11 fee-shifting.

Hays, 847 F.2d at 419 (citations omitted).

Because the decision of the court below is clearly correct, there is no reason to prolong this attorney's fee litigation by granting review of the appellate fees issue. If the Court wishes to correct the error of the Fourth and Ninth Circuits on this limited question, it can do so in a case arising out of one of those circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 18, 1989

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Supreme Court, U.S.
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NOV 30
JOSEPH F. SPANIOL, JR.
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(3)

No. 89-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 16, 1989
CERTIORARI GRANTED OCTOBER 16, 1989

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3568

DANIK, INC.,

Plaintiff,

v.

HARTMARX CORPORATION, *et al.*,

Defendants.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
Nov 29	1	COMPLAINT. bl
1984		
Feb 27	21	Affidavits (4) of Faye C. Reid, Nicholas H. Hantzes, Joseph M. Cahill and Dale A. Cooter. (mj)
Mar 14	23	DEPOSITION of Manoochehr John Dashtara taken on 2-29-84 on behalf of defts; Exhibit 1. (signature waived) (dj)
Apr 30	28	NOTICE of pltf to dismiss action without prejudice. (dj)
June 29	29	TRANSCRIPT Of proceedings taken June 15, 1984: pp: 1 thru 70A; (Rep: Harry Deutsch). (mj)
1987		
12/2/87	31	ORDER directing deft to submit to the court a statement of costs and attorneys' fees incurred in the captioned case by 12/11/87. (signed 12/1/87) (N) GASCH, J. (hls)

DATE	NR.	PROCEEDINGS
Feb 29	38	MEMORANDUM (N) (filed 2/26/88) GASCH, J. (hls)
1988		
Feb 29	39	ORDER filed 2/26/88 granting defts' motion for sanctions; directing that the law firm of Cooter & Gell shall forthwith pay to the Hartmarx Corp ($21,452,52) as a sanction for violating FRCP 11; further directing Danik, to forthwith pay to the Hartmarx Corp. ($10,701,26) as sanction for violating FRCP 11 (N) GASCH, J. (hls)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

CLASS ACTION TO SECURE INJUNCTIVE RELIEF AND RECOVER TREBLE DAMAGES FOR FEDERAL ANTITRUST VIOLATIONS

The Plaintiff on behalf of itself and all others similarly situated for their Complaint allege:

JURISDICTION

1. This is a class action seeking damages and injunctive relief for injuries sustained by Plaintiff, and the members of the class it represents, resulting from violations by the Defendants, as hereinafter alleged, of § 1 of the Sherman Antitrust Act (15 U.S.C. § 1), and of § 2 of the Clayton Act as amended by the Robinson-Patman Act, (15 U.S.C. § 13(a) (f)).

2. The jurisdiction of the Court over this action is conferred by §§ 4, 12 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22 and 26; and by 28 U.S.C. §§ 1331, 1332, and 1337.

3. The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

PARTIES AND VENUE

4. Danik, Inc. (Danik) is a District of Columbia corporation with its principal place of business at 8133 Watson Street, McLean, Virginia 22101. Danik owns and operates men's clothing stores known as Dash's Designer in the Washington, D.C. Metropolitan Area.

5. Hartmarx Corporation (Hartmarx) is a Delaware corporation with its principal place of business in Chicago, Illinois. Hartmarx is the preeminent source of wearing apparel in the United States. Hartmarx is the parent corporation of three subsidiary men's clothing manufacturers and distributors that are Defendants in this action. Hartmarx is engaged in interstate commerce and transacts business and has substantial contacts in the District of Columbia.

6. Hickey-Freeman Co., Inc. (Hickey-Freeman) is a subsidiary of Hartmarx, is a New York corporation with its principal place of business in Rochester, New York. Hickey-Freeman is a leading manufacturer and distributor of men's suits engaged in interstate commerce and transacts business and has substantial contacts with the District of Columbia.

7. Hart, Schaffner & Marx (Hart, Schaffner & Marx) is a subsidiary of Hartmarx, is a New York corporation with its principal place of business in Chicago, Illinois. Hart, Schaffner & Marx is a leading manufacturer and distributor of men's suits engaged in interstate commerce and transacts business and has substantial contacts in the District of Columbia.

8. Venue is properly laid in the District of Columbia pursuant to 28 U.S.C. § 1391(b) and 15 U.S.C. § 22.

INTERSTATE COMMERCE

9. Upon information and belief, Hartmarx, with a multi-million dollar a year business, systematically acquires, buys and sells goods which it moves in interstate commerce and its activities have a substantial impact on interstate commerce.

10. Upon information and belief, Hartmarx either manufacturers better men's apparel from plants operated by it or by affiliate companies including, but not limited to, Hickey-Freeman and Hart, Schaffner & Marx, which

are located in various states of the United States, and all the goods, including the material used for the production as well as the finished products, flow into interstate commerce.

11. Defendants in turn sell their menswear to numerous retail customers located throughout the United States and such activities are within the flow of interstate commerce and directly and substantially affect such commerce.

DEFINITIONS

12. a. "Metropolitan Area" means Standard Metropolitan Areas as defined by the Bureau of Consensus.

b. "Men's Suits" means menswear consisting of a coat and trousers of matching material (with or without a vest) excluding uniforms.

c. "Men's Better Priced Suits" means men's suits which are normally priced at $50.00 or above at wholesale by the manufacturer.

CLASS ACTION ALLEGATIONS

13. Plaintiff brings this action on behalf of itself, and pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, as a representative of a class consisting of all men's retail clothing merchants in the United States other than those that are exclusive agents of the Defendants Hart, Schaffner & Marx Corporation and Hickey-Freeman Co., Inc. for the sale of Hart, Schaffner and Marx suits.

14. The class of Plaintiffs is so numerous that joinder of all the members is impractical. Plaintiff is presently unable to state the precise size of the class, which Plaintiff believes numbers in the hundreds. In many instances the retail merchants are unaware that claims on their behalf exist, or are unaware of the facts giving rise to such claims, or having knowledge of such claims, have,

in various instances, sustained damages in such an amount that when taken individually are to small to justify the enormous expense and effort required to sue separately, but whose damages are of such a significant size, if taken as a group, that they justify taking legal action.

15. Common questions of law and fact affect the rights of each member of the class, and common relief by way of damages and final injunctive relief is sought for the class as a whole.

16. The questions of law and fact common to the class which relate to violations of the law alleged herein predominate over any questions which may affect only individual class members.

17. Common questions of law and fact which predominate in this class action include, but are not limited to, the following:

(a) Whether Hart, Schaffner & Marx and Hickey-Freeman and the exclusive retailer agents have engaged in an unlawful conspiracy, combination or agreement to fix prices and eliminate competition in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits and otherwise restrain trade in the sale of better men's suits.

(b) Whether Defendants Hartmarx, Hart, Schaffner & Marx and Hickey-Freeman and the co-conspirators have effectuated the conspiracy or combination by establishing an exclusive retail agent policy and a uniform pricing scheme.

(c) Whether the effect of the Defendants' and co-conspirators' exclusive retailer agent policy and pricing scheme is to fix prices in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits.

(e) Whether the effect of the Defendants' and co-conspirators' exclusive retailer agent policy and pricing is to unreasonably restrain trade between the exclusive agents and the class members in the sale of better priced men's suits.

18. These issues are common to the class because all class members seek to establish the unlawful conspiracy described above through the same facts and documents in possession of the Defendants and co-conspirators. The documents in possession of the Defendants and co-conspirators will prove the existence of a conspiracy among them to eliminate competition or otherwise restrain trade in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits. The documents will also establish that the exclusive retailer agent policy was used in conjunction with the uniform pricing practices of the Defendants to fix and maintain the resale price of Hart, Schaffner & Marx and Hickey-Freeman suits. The class members will seek to prove by the same documents in possession of the Defendants that pursuant to the exclusive retailer agent policy, Defendants will only sell Hart, Schaffner & Marx and Hickey-Freeman better priced men's suits to one retailer on each major metropolitan area in the United States, that the exclusive agent had a restricted territory in which to resell the suits, and that the Defendants boycotted and refused to deal with the class members in order to restrict the number of retailers who would sell the suits. Proof of this all-embracing conspiracy and its general objectives, therefore, will establish the liability of the Defendants for violation of Section 1 of the Sherman Act. Even if proof of the conspiracy itself does not demonstrate that the Defendants and the co-conspirators fixed prices, all class members will rely on the testimony of economic experts to establish that the operation of the exclusive retailer agent policy in conjunction with the uniform pricing practices virtually eliminated competition in the sale of Hart,

Schaffner & Marx and Hickey-Freeman suits. The conspiracy involves the preeminent source of wearing apparel in the United States, two of its subsidiaries that are leading manufacturers and distributors of better men's suits, and certain co-conspirator retailers. All class members will maintain that as a matter of law the existence of a conspiracy involving this group that has the effect of eliminating price competition, restricting retailer sales territory, restricting the number of retailers, and boycotting and refusing to deal with all but a handful of men's clothing retailers in the United States is an unreasonable restraint of trade between the exclusive agents and the class members of the sale of better priced men's suits.

19. The claims of the named Plaintiff herein are typical, in all important respects, of the claims of each and all of the class members and are based upon and arise out of the same facts constituting the Defendants' unlawful conduct. Danik's claims involve the same legal and factual issues that are common to the class and, therefore, as a men's clothing retail merchant, its claim is typical of the claims of all the class members. In particular, Danik seeks to establish that the Defendants and the co-conspirators conspired to fix prices and eliminate competition in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits or otherwise unreasonably restrain trade between the class members and the exclusive retail agents in the sale of better men's suits. Furthermore, Danik seeks to establish that the conspiracy was effectuated by the exclusive retail agent policy and uniform pricing scheme developed by the Defendants and the co-conspirators. Pursuant to the terms of the exclusive agent policy, Danik will seek to prove that the Defendants could not permit Danik to purchase Hart, Schaffner & Marx and Hickey-Freeman suits or otherwise compete with the exclusive agents in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits. In

other words, Danik and the other class members as a group, were denied the opportunity to purchase Hart, Schaffner & Marx and Hickey-Freeman suits and thereby denied the opportunity to compete with the exclusive agents. Upon proving the existence of the conspiracy and purpose, Danik will seek the same relief as sought by the other class members for injury caused by the unlawful conspiracy and restrain of trade, enjoining the Defendants and co-conspirators from pursuing said policies and recovering damages for lost profits of the sales. The claims of Danik are, therefore, not only typical of, but identical to the other claims of the class of which it is a member.

20. The Plaintiff will fairly and adequately represent the interest of the class and the individual class members because, by reason of the similarity of the claims of the Plaintiff and the individual class members, the successful assertion of the Plaintiffs' claim herein will necessarily establish determinations of fact and law adequate to prove the liability of the Defendants to each class member. In particular, successful assertion of the named Plaintiff's claim will establish that the Defendants and their exclusive agents have unlawfully conspired among themselves in restraint of trade to create an exclusive agent retailer policy and pricing scheme that enables the Defendants and its co-conspirators to fix the price of Hart, Schaffner & Marx and Hickey-Freeman suits and refuses to deal with any of the class members and thereby eliminates competition in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits and unreasonably restrains trade in the sale of better priced men's suits. Danik's interests are co-extensive with those of the class as are each class member's to the other class members. Although all the members of Plaintiff's class are competitors in the sale of men's suits, as to the class claims they seek the common relief of eliminating price fixing and the other unreasonable restraints of trade that accompany the exclusive retailer agent policy and uniform pricing scheme of the

Defendants and co-conspirators. Furthermore, Plaintiff is represented by skilled and experienced attorneys who will fairly and adequately represent the interest of the absent members of the class.

21. Class actions are superior to other available methods for fair and efficient adjudication of this controversy against the Defendants. In particular, the class action will promote economies of time, effort and expense and will avoid a multiplicity of actions and delay in securing the class members' legitimately claimed relief of elimination of price fixing and other unreasonable restraints of trade in the men's retail clothing industry.

VIOLATIONS ALLEGED

22. Upon information and belief, Hart, Schaffner & Marx is registered with the United States Patent Office, Trademark Division, and is the trademark owner of one or more trademarks consisting of the name Hart, Schaffner, & Marx.

23. Upon information and belief, Hickey-Freeman is registered with the United States Patent Office, Trademark Division, and is the trademark owner of one or more trademarks consisting of the name Hickey-Freeman.

24. Hartmarx has combined, conspired and agreed with its subsidiaries Hart, Schaffner and Marx and Hickey-Freeman to engage in the above enumerated unlawful acts and practices.

25. Defendants at all times relevant have and still do heavily promote their trademark items bearing the trademark name Hart, Schaffner & Marx and Hickey-Freeman and widely advertise those trademarks.

26. Defendants sell their Hart, Schaffner & Marx and Hickey-Freeman men's suits to various retail stores located throughout the United States and upon information and belief, as part of their sales and promotion program,

vigorously adhere to what is known as an exclusive retailer agent policy whereby Defendants will only sell Hart, Schaffner & Marx and Hickey-Freeman men's suits to one retailer in each major metropolitan area in the United States, including the Washington, D.C. Metropolitan Area. Upon information and belief, either as a condition of the exclusive retailer status or by agreement with the retailer, Hart, Schaffner & Marx and Hickey-Freeman men's suits are sold by the retailer at the Defendants' suggested retail price or at an artificially high price.

27. In addition, upon information and belief, for several years continuing to the present time, Hartmarx, Hart, Schtffner & Marx, Hickey-Freeman, and the other exclusive retailer agent co-conspirators have combined, conspired and agreed with one another to fix prices and eliminate competition in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits and to otherwise restrain trade in the sale of better men's suits.

28. By virtue of the exclusive agent policy, Defendants and the co-conspirator retailers have engaged in combinations, conspiracies and agreements that include the following unlawful acts and practices:

a. Defendants and the co-conspirators have determined, fixed and maintained prices at which to sell Hart, Schaffner & Marx and Hickey-Freeman men's suits;

b. Defendants and the co-conspirators have restricted the territory in which exclusive agent retailers of Hart, Schaffner & Marx and Hickey-Freeman suits may sell such men's suits;

c. Defendants and the co-conspirators have restricted the number of retailers that may sell Hart, Schaffner & Marx and Hickey-Freeman suits;

d. Defendants, in combination, conspiracy and agreement with the co-conspirators have boycotted and refused to deal with Danik in order to eliminate Danik as a com-

petitor and to enforce the policies and practices of fixing and maintaining prices and restricting territories.

29. Danik has for the last several years attempted to place orders with the Defendants for their Hart, Schaffner & Marx and Hickey-Freeman suits and Defendants have continuously refused to acept the order of Danik for Hart, Schaffner & Marx and Hickey-Freeman suits.

30. This price fixing policy is being maintained with the implicit or explicit understanding and agreement of the exclusive agent retailers of Hart, Schaffner & Marx and Hickey-Freeman suits which are in direct competition with Danik with the effect and result that a uniform barrier is being erected to retail price competition.

31. By the foregoing policy, Defendants are compelling agreement between them and their exclusive agents to fix and maintain the resale price of Defendants' products bearing the Hart, Schaffner & Marx and Hickey-Freeman trademark and are further perpetuating a trademark monopoly as a consequence thereof and directly impacting upon interstate commerce.

32. Hartmarx, as the preeminent source of quality wearing apparel in the United States, and as a consequence of the popularity of the Hart, Schaffner & Marx and Hickey-Freeman trademark merchandise, and as a further consequence of the utilization of its trademark monopoly, Defendants have acquired, as far as the Hart, Schaffner & Marx and Hickey-Freeman suits are concerned, a unique position with no real competitive alternative in the retail sales industry of men's better suits.

33. The Defendants' conspiracy with their retail store exclusive agents to fix the retail price of Hart, Schaffner & Marx and Hickey-Freeman suits *has caused*, among other things, the following unlawful *effects*, which as a conspiracy was designed to accomplish:

a. The resale prices of Hart, Schaffner & Marx and Hickey-Freeman suits have been fixed and maintained in an arbitrary and non-competitive level;

b. The territory in which the retail store exclusive agents of the Defendants may resell Hart, Schaffner & Marx and Hickey-Freeman better men's suits has been restricted;

c. The number of retail merchants selling Hart, Schaffner & Marx and Hickey-Freeman suits has been restricted to one in each major metropolitan area with the direct result that competition in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits in the major metropolitan areas in the United States has been restricted;

d. Purchasers of Hart, Schaffner & Marx and Hickey-Freeman suits have been denied the opportunity of choosing other retailers and from purchasing at competitive prices;

e. Price and other forms of competition have been eliminated or substantially reduced in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits generally and between all retail stores engaged in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits;

f. Danik and other competitive retailers have been prevented and excluded from selling Hart, Schaffner & Marx and Hickey-Freeman suits since their principal means of breaking into the market is price competition.

34. The foregoing combinations, conspiracies and agreements in the acts and practices pursuant thereto of Defendants and the co-conspirators were and are in restraint of trade or commerce among the several states in violation of § 1 of the Sherman Act (15 U.S.C. § 1).

35. As a result of the unlawful combinations, conspiracies, agreements, acts and practices alleged against Defendants and the co-conspirators herein constituting a violation of § 1 of the Sherman Act, Danik has been irreparably injured in its business in the form of lost profits and sales, and its business and property have been destroyed.

WHEREFORE, Danik demands:

a. That this Court adjudge and decree that the acts of the Defendants as hereinabove described have been and continue to be in violation of the antitrust law, including § 1 of the Sherman Antitrust Act and that, therefore, all contracts made between the Defendants and the co-conspirators in violation of the antitrust laws are void and have no effect;

b. That a Temporary Restraining Order and Preliminary Injunction be issued out of this Court upon its Order directing the Defendants, its present and future officers, directors, employees, agents, successors and assignees to refrain from entering into, adhering to, renewing, maintaining or furthering, directly or indirectly, any like or similar combination or restraint of a sale of men's wear herein alleged, and that after a trial of this cause, that said injunction be perpetual.

c. For a decree ascertaining the damages suffered by Danik by reason of the unlawful acts of the Defendants herein complained of, and awarding judgment in favor of Danik and against the Defendants for treble the amount of said damages together with Danik's reasonable attorney's fees and all costs and disbursements of this action.

d. For such other and further different relief which to the Court may seem necessary and appropriate.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

AFFIDAVIT

M. John Dashtara, President and Treasurer of Danik, Inc., being duly sworn according to law, hereby deposes and says that the facts set forth in the foregoing Complaint are true and correct to the best of his knowledge, information and/or belief.

/s/ M. John Dashtara
M. JOHN DASHTARA

(Jurat Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

AFFIDAVIT OF FAYE C. REID

I, Faye C. Reid, under penalty of perjury, hereby depose and say as follows:

1. I am over the age of 18 and I am competent to testify to the following on personal knowledge.

2. I am employed as a secretary at Cooter & Gell, which law firm represents Danik, Inc. in the instant law suit.

3. On or about November 4, 1983, at the request of Joseph Cahill, an attorney at Cooter & Gell, I telephoned a number of clothing stores in the Washington, D.C. metropolitan area which I know sell men's suits and sportcoats to inquire as to whether they sell Hart Schaffner & Marx suits. I spoke with salespeople at Arthur Adler, Britches of Georgetown, Brooks Brothers, Garfinkel's, Lewis & Thos. Saltz, Bloomingdale's, Woodward & Lothrup, and Hecht's, all of whom told me that they did not carry the Hart Schaffner & Marx brand. The salespeople I spoke to at Bloomingdale's and Woodward & Lothrup added that Raleigh's was the only store they knew of that carried that line in the Washington, D.C. area. When I called Sym's Inc., their reply was that they could not discuss manufacturers over the telephone. I spoke to a gentleman named Sid at Raleigh's in the men's department who told me that Raleigh's was the exclusive dealer of Hart Schaffner & Marx suits in the Washington, D.C. area.

4. I then placed calls to Bloomingdale's, Sak's Fifth Avenue and Paul Stewart's in New York City, and was told by salespeople at each of those stores that they did not carry the Hart Schaffner & Marx line. The person I spoke with at Paul Stewart's said that Wallach's was the only store that he knew of in New York City that carried that line. When I called Wallach's, the salesman told me "we practically are Hart Schaffner & Marx".

5. I placed calls to Today's Man, Wanamaker's, Jacob Reed's Sons, and Strawburg's in Philadelphia. Ed Gallagher at Wanamaker's confirmed that Wanamaker's carried Hart Schaffner & Marx, and when asked if he knew of any other store in Philadelphia which sold that line, he said that he thought Strawburg's might. The salespeople at Today's Man and Strawburg's told me that they did not carry Hart Schaffner & Marx suits, and I found upon calling Jacob Reed's Sons that they were no longer in business in Philadelphia.

/s/ Faye C. Reid
FAYE C. REID

(Jurat Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

AFFIDAVIT OF NICHOLAS H. HANTZES

I, Nicholas H. Hantzes, under penalty of perjury, hereby depose and say as follows:

1. I am over the age of 18 and I am competent to testify to the following on personal knowledge.

2. I am an attorney at the law firm of Cooter & Gell, and in that capacity I have represented Danik, Inc. in the instant action, as well as in other litigation pending between Danik, Inc. and affiliates of the Defendants herein.

3. On or after February 2, 1984, after being served with and reviewing Defendants' Motion For Sanctions Pursuant To Rule 11 filed herein, I began to investigate the factual basis for Defendants' claim that they did not engage in an exclusive retailer agent policy as to the sale of Hart Schaffner & Marx and Hickey-Freeman suits, as Danik had alleged in its Complaint herein. To begin with, I went to a local library and reviewed telephone directory yellow pages for a number of cities, looking at listings under the hearing "Men's Clothing And Furnishings-Retail". I was looking for listings and advertisements by stores which claimed to carry Hickey-Freeman and Hart Schaffner & Marx suits. I found in several cities, notably Philadelphia and Detroit, that the only store listings which mentioned Hickey-Freeman also claimed in their advertisement to be the exclusive agent for Hickey-Freeman clothing. In many cities there was a sub-heading called "Hart Schaffner & Marx" or

"Hickey-Freeman", under which there was only one retailer listed, generally with several locations in that area. Perusal of the Hartmarx prospectus revealed that many of the stores listed in this manner are wholly owned Hartmarx subsidiaries. The Los Angeles area yellow pages were representative of what I found in many of these cities: there is a specific listing for Hart Schaffner & Marx clothing, under which the only retailer listed is Silverwood's, a wholly owned subsidiary of Hartmarx. Another store, Eagleson's, advertised that it carries Hart Schaffner & Marx in big and tall sizes. No other stores in the Los Angeles area mentioned the names Hart Schaffner & Marx or Hickey-Freeman in their advertisements.

4. I subsequently placed telephone calls to stores in cities listed in the affidavits attached to Defendants' Motion For Sanctions in which the Defendants claim to sell the Hart Schaffner & Marx and Hickey-Freeman lines to a number of retailers. In Philadelphia I telephoned Jacob Reed's Sons, a store which advertised in the yellow pages that it was the exclusive agent of Hickey-Freeman clothing, and learned from that telephone call that Jacob Reed's Sons had gone bankrupt and was out of business. I subsequently spoke to a salesman at Boyd's in Philadelphia and was advised that Boyd's was the only retailer in Philadelphia which sold Hickey-Freeman suits since Jacob Reed's had gone out of business. Boyd's does not sell Hart Schaffner & Marx suits. Despite the Boyd's salesman's representations, I determined that Wanamaker's in Philadelphia sells Hickey-Freeman suits and also that it sells Hart Schaffner & Marx suits. I was not able to find any other retailer in Philadelphia which sells these lines.

5. Upon calling a number of retailers in Boston, in which city Hickey-Freeman allegedly sells to four retailers and Hart Schaffner & Marx allegedly sells to sixteen retailers, I found only one store which claimed to carry

a full selection of Hart Schaffner & Marx and Hickey-Freeman suits, that being Wallach's, a Hartmarx subsidiary. A salesman in a Boston Department store, Jordan Marsh, stated that it sells only a limited selection of Hart Schaffner & Marx clothing and that Wallach's had a much broader selection. The only other store in Boston which I could determine sells Hart Schaffner & Marx suits is a big and tall men's clothing store called Hajjars.

6. Based upon the listings in the Los Angeles pages under Hart Schaffner & Marx, I telephoned Silverwood's, a wholly owned subsidiary of Hartmarx, to inquire of their salesmen whether they knew of any other stores in the Los Angeles area which carried Hart Schaffner & Marx suits. I was told by a salesman there that in the Western states, including Utah, Idaho and California, Hart Schaffner & Marx suits could only be purchased from retailers which are Hartmarx subsidiaries.

7. The pattern which became apparent to me from my investigation is one wherein most major metropolitan areas contain one major retailer which carries a full selection of either or both Hart Schaffner & Marx and Hickey-Freeman suits. All other retailers in that area carry only a very limited selection of these lines, often in only special sizes, such as big and tall, if they carry these labels at all. Where there is more than one retailer offering a broad selection of these lines in one area they are generally both (or all) wholly owned Hartmarx subsidiaries. Alternatively, if there are two retailers in the same city selling these lines, one will offer Hickey-Freeman and the other will offer Hart Schaffner & Marx, or one will carry both and the other will carry only one of the two labels, as is the case in Philadelphia. In any event, the lines are sold, throughout the United States, in such a way as to keep competition in the sale of these lines to a minimum. In addition, very few retailers which are not Hartmarx subsidiaries, or which are not exclusive

Hart Schaffner & Marx or Hickey-Freeman agents are able to sell these suits to their customers, thereby limiting their ability to compete against the few stores in their area which do carry these lines.

/s/ Nicholas H. Hantzes
NICHOLAS H. HANTZES

(Jurat Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted in printing)

AFFIDAVIT OF JOSEPH M. CAHILL

I, Joseph M. Cahill, under penalty of perjury, hereby depose and say as follows:

1. I am over the age of 18 and I am competent to testify to the following on personal knowledge.

2. I am an attorney at the law firm of Cooter & Gell, and in that capacity I have represented Danik, Inc. in the instant action, as well as in other litigation pending between Danik, Inc. and affiliates of the Defendants herein.

3. On or about November 4, 1983, I initiated an investigation by employees of this firm as to the truth of information received from principals of our client, Danik, Inc., that Hart Schaffner & Marx and Hickey-Freeman suits were sold by only one retailer in the Washington, D.C. area, and in most other major metropolitan areas. I was aware that Raleigh's, a Washington, D.C. area retailer, advertised regularly that it was the exclusive agent for Hart Schaffner & Marx suits in this area, and I was also aware that Danik, Inc. had been unable, despite their efforts, to purchase Hart Schaffner & Marx and Hickey-Freeman label suits from subsidiaries of the Hartmarx Corporation. To verify our client's claim of an exclusive dealership arrangement, I asked Faye Reid, a secretary at this firm, to telephone the better known clothing retailer in the Washington, D.C. area to inquire of them whether they sold Hart Schaffner & Marx suits, and if not, whether they knew who did.

4. Mrs. Reid's efforts revealed that not one retailer besides Raleigh's appeared to sell Hart Schaffner & Marx suits in the Washington, D.C. area. (See Affidavit of Faye C. Reid) Based upon this information I then telephoned a number of clothing retailers in the Baltimore area to see if there was also only one retailer in Baltimore selling Hart Schaffner & Marx suits. I called Hamburger's, which I know to be a popular menswear store in Baltimore, and was told that they did carry Hart Schaffner & Marx. When asked if he knew of any other store in Baltimore which sold Hart Schaffner & Marx suits, the salesman I spoke to told me that he did not know of any others. I then called several other Balitmore menswear stores and was told that they did not carry those lines.

5. Having determined to my satisfaction that the Washington, D.C. and Baltimore areas each contained only one retailer of a significant size–which sells Hart Schaffner & Marx suits, I asked Mrs. Reid to telephone a number of retailers in Philadelphia and New York, N.Y. which I thought would be likely to sell Hart Schaffner & Marx and Hickey-Freeman suits, to determine if the exclusive retailer pattern I found in the Baltimore and Washington, D.C. areas extended to those metropolitan areas. Mrs. Reid's telephone calls revealed again that there appeared to be only one major retailer in each Philadelphia and New York, N.Y. selling Hart Schaffner & Marx suits. (See Affidavit of Faye C. Reid)

6. Based upon our investigation as described above and upon the information received from our client, I believed to the best of my knowledge and information, at the time I signed the Complaint herein that there was good ground to support the allegations contained therein.

/s/ Joseph M. Cahill
JOSEPH M. CAHILL

(Jurat Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

AFFIDAVIT OF DALE A. COOTER

I, Dale A. Cooter, under penalty of perjury, hereby depose and say as follows:

1. That I am over the age of 18 and that I am competent to testify to the following on personal knowledge.

2. That I am a partner at the law firm of Cooter & Gell, and in this capacity I have represented the Plaintiff herein, Danik, Inc., in a number of lawsuits involving the Defendants and several additional subsidiaries and affiliates of the Defendants herein.

3. One of the subsidiaries of Hartmarx, Intercontinental Apparel, Inc., (Intercontinental), filed an action in 1983 against Danik and its president, Manoochehr John Dashtara, for the recovery of approximately $108,000.00 claimed to be due and owing to Intercontinental for the sale of menswear to Danik for the Spring 1982 season. Prior to the institution of that action and early in the attorney-client relationship between my firm and Danik, the principals of Danik approached me and explained that they felt they had a valid price discrimination claim against Intercontinental which justified the withholding of the monies claimed to be due and owing Intercontinental. Shortly thereafter, Intercontinental sued Danik for the $108,000.00 and we filed a Counterclaim on Danik's behalf alleging Robinson-Patman price discrimination.

4. As we became better acquainted with the business of Danik and with the business of Intercontinental, Hartmarx Corporation and other Hartmarx subsidiaries with which Danik had dealt, we were advised by our clients that they had over the years attempted to purchase the Hart Schaffner & Marx and Hickey-Freeman lines of menswear, manufactured by subsidiaries of Hartmarx, which lines were superior to those Danik had previously purchased from Intercontinental, and that these attempts had been completely unsuccessful. We were advised that Hart Schaffner & Marx and Hickey-Freeman Company chose to sell its lines of better men's suits to only a few select retailer, and that in the Washington Metropolitan Area it refused to sell these lines to any retailer other than Raleighs.

5. As discovery progressed in the underlying collection case, it became clear to me that the business of Danik had been damaged not only by Intercontinental's price discrimination, but that it had also been injured as a result of price discrimination on the part of other Hartmarx subsidiaries with which Danik had dealt, and by a conspiracy between Intercontinental and those subsidiaries whereby they agreed to stop doing business with Danik. In addition, the Danik principals insisted that they were unable to effectively compete against Raleighs because Raleighs was able to buy the Hart Schaffner & Marx and Hickey-Freeman lines of better menswear from subsidiaries of Hartmarx which Danik was not able to purchase.

6. Based upon our belief that the same price discrimination was being practiced by the other Hartmarx subsidiaries with which Danik had dealt and that there was a conspiracy between the subsidiaries and Intercontinental to cease doing business with Danik, we filed on Danik's behalf an Amended Counterclaim in the underlying collection suit which added several defendants and a Sherman Act conspiracy claim. In addition, as counsel for Dan[illegible] we determined that these facts also formed the basis for a class action on behalf of similarly situated

retailers against Intercontinental, the other subsidiaries, and against Syms, Inc., the retailer receiving the benefit of the price discrimination. At the same time, we recognized that, if the principals of Danik were correct in their assertions that the Hart Schaffner & Marx and Hickey-Freeman lines were sold only to one retailer in the Washington, D.C. area, to the exclusion of all others, there existed a basis for a federal antitrust action against the Defendants herein for resale price maintenance. However, it was determined that if such practice were in place, not only was Danik a party injured by such a practice, but all other retailers similarly situated were also victims of this practice. It was at this point that I directed other attorneys in the law firm of Cooter & Gell to institute an investigation to determine whether, in fact, Raleigh's was the only retailer in the Washington, D.C. area selling the Hart Schaffner & Marx and Hickey-Freeman labels, and whether such an exclusive retailer agent policy existed in other major metropolitan areas.

6. The information which was obtained from the investigation made by my firm, which is outlined in the Affidavits of Faye C. Reid, Nicholas Hantzes and Joseph M. Cahill, filed herewith, was presented to me. Based upon this information I believed, to the best of my knowledge and information, at the time I signed the Complaint, that there was good ground to support the allegations therein.

7. Subsequently, Complaints were prepared for the instant lawsuit and for the related class action. Prior to my filing these Complaints, I scheduled a meeting with counsel for Intercontinental in the underlying collection suit wherein I presented counsel with draft copies of those Complaints and outlined a settlement offer which encompassed the collection suit and the two class actions. I made clear at that meeting and in subsequent conversations with counsel for the Defendants, that it was not my intention to simply "wash out" the collection with my forebearance in filing these class actions. I stated to counsel that I felt that Defendants faced more exposure from these class actions than did my client in the underlying collection suit, and that it was my intention to give Defendants an opportunity to consider settlement of the class action suits prior to the certification of the class actions, after which time I would no longer be able to engage in settlement discussions on my client's behalf alone. At no time was it my intention to threaten the Defendants with the filing of the class actions solely for the purpose of having the underlying collection suit dismissed or otherwise for harrassment purposes.

/s/ Dale A. Cooter
DALE A. COOTER

(Jurat Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

Washington, D.C.

Wednesday, February 29, 1984

DEPOSITION OF MANOOCHEHR JOHN DASHTARA

• • • •

[3] PROCEEDINGS

Thereupon,

MANOOCHERR JOHN DASHTARA,

a witness, was called for examination by counsel for the defendant and, after being duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL
FOR THE DEFENDANT

BY MR. FAVRETTO:

Q Would you state your name, please, sir.
A Manoochehr John Dashtara.
Q What is your occupation?
A I am president of Danik, Inc., trading as Dash's Designer.
Q How long have you had that position?
A Since 1969.
Q In what business is that? What does that involve?
A It's men's clothing.
Q How long have you been in that business?
A Since 1969.

Q At what location?
A At Georgetown. I had four locations between 1969 to now, and at present I have five locations, which—one [4] is in Tyson's Corner, Virginia. One is on Rockville Pike, Maryland. One is at 19th Street, N.W., and one is at 3229 M Street, Georgetown, and one at 1309 F Street, Washington, D.C.
Q Have you always traded under the name of Dash's Designer since 1969?
A No, we did not.
Q What did you start as in 1969?
A In 1969 we started as Generation Gap, and then later on—later—a few years later we started Dash's.
Q Has your men's wear business always been conducted in the Washington, D.C. area?
A Yes.
Q What did you do prior to 1969?
A Around 1969 I came to this country, and I was going to go to college, which I didn't, and I started to work then. I started Dash's in 1969.
Q Have you ever done business in the men's wear industry in any location besides Washington, D.C.?
A No.

MR. FAVRETTO: I would like to identify as an exhibit a multipage document entitled, "Class Action to [5] Secure Injunctive Relief and Recover Trouble Damage for Federal Antitrust Violations." It has attached to it as the last page a single-page document entitled, "Affidavit," and I'd like to mark that as Dashtara Exhibit Number 1 for identification.

(Dashtara Deposition Exhibit Number 1, a copy of a document, was marked for identification and attached to the court copy of this deposition.)

MR. COOTER: I want to go off the record just for a moment.

(Discussion off the record.)

BY MR. FAVRETTO:

Q Mr. Dashtara, I will hand you a copy of Deposition Exhibit 1, and I have also given a copy of the exhibit to counsel. Do you have it in front of you, sir?

A Yes.

Q Are you familiar with this document?

A No. What is that?

MR. COOTER: This is the Complaint that we filed against Hartmarx. You are familiar with it, generally, aren't you?

THE WITNESS: Yes.

[6] BY MR. FAVRETTO:

Q It is true, is it not, that this is the Complaint that was filed against Hartmarx, Hickey-Freeman and Hart, Schaffner and Marx—

A Yes.

Q —in this action?

A Yes.

MR. COOTER: I take your representation for that. I assume it's true.

BY MR. FAVRETTO:

Q I refer you to the—

MR. COOTER: We will stipulate that he signed the affidavit on the back.

BY MR. FAVRETTO:

Q That is the last page that you are referring to?

A Yes.

Q That is your signature?

A Yes, it is.

MR. FAVRETTO: Could we break for a second.

(Discussion off the record.)

MR. FAVRETTO: Back on the record.

BY MR. FAVRETTO:

[7] Q Mr. Dashtara, have you read the document?

A I don't remember. I mean, I signed the document. I will have to read it again to refresh my memory.

Q Do you recall whether you have ever read it at one time or another?

A I signed several documents, which I don't know which one is which.

Q Mr. Dashtara, I'd like to call your attention to the last page, which is entitled, "Affidavit."

A Yes. I said I signed it.

Q You signed that affidavit?

A That's correct.

Q The affidavit says, "M. John Dashtara, president and treasurer of Danik, Inc., being duly sworn according to law, hereby deposes and says that the facts set forth in the foregoing Complaint"—

A Yes.

Q That's this document, which precedes the affidavit —"are true and correct, to the best of his knowledge, information and/or belief."

A Yes.

Q Is that what it says?

[8] A Yes.

Q I ask you again, before signing this affidavit on November 21, 1983, did you have occasion to read the Complaint or otherwise review it in any manner?

A Yes, I did.

Q Could you describe the nature of that review?

A What do you mean by that?

Q Did you read the Complaint yourself?

A No. Someone did read it to me.

Q Who read that to you?

A Mercedes—my sister-in-law. She read it to me, and I signed it.

Q Did she read every part of it to you?

A I believe so.

Q She read it to you on or before the 21st day of November 1983?

A Yes.

Q Could you identify your sister-in-law for us, please? What is her name?

A Mercedes Dashtara.

MR. COOTER: More properly, I think it's legally Mercedes Dash.

[9] THE WITNESS: Mercedes Dash.

BY MR. FAVRETTO:

Q Is she an employee of the company?

A Yes, she is.

Q What is her title in the company?

A She's our secretary in the company.

Q Is that an officership?

A No.

MR. COOTER: She is a secretary in the office of the company.

THE WITNESS: Right.

MR. COOTER: That's a fair rendition.

BY MR. FAVRETTO:

Q Mr. Dashtara, I'd like to call your attention to paragraph 26 of Deposition Exhibit Number 1.

A Right.

MR. COOTER: Off the record.

(Discussion off the record.)

MR. FAVRETTO: I would like the record to reflect that counsel for the witness has just read to him paragraph 26 in Deposition Exhibit Number 1.

BY MR. FAVRETTO:

[10] Q Mr. Dashtara, do you understand what counsel has just read to you?

A Yes, I do.

Q I would like to call your attention specifically to that part of the paragraph which states, in the first sentence which states that, and I quote, "Defendants sell their Hart, Schaffner and Marx and Hickey-Freeman men's suits to various retail stores located throughout the United States, and, upon information and belief, as part of their sales and promotion program, vigorously adhere to what is known as an exclusive retailer agent policy whereby defendants will only sell Hart, Schaffner and Marx and Hickey-Freeman men's suits to one retailer in each major metropolitan area in the United States, including the Washington, D.C. metropolitan area." I ask you, Mr. Dashtara, what is the basis for your belief that this was true and correct, as written?

MR. COOTER: Listen to me, Mr. Dashtara. You may answer that question if you had information other than what you received from counsel. You may not tell Mr. Favretto what conversations you had with either myself or with any other person associated with my law firm, so if the basis of [11] your information is what we told you, then you may not answer that question. Do you understand?

THE WITNESS: Yes.

MR. COOTER: Do you have any other information, other than what we told you?

THE WITNESS: No.

MR. COOTER: Then you may not answer that question.

BY MR. FAVRETTO:

Q Mr. Dashtara, did you conduct any independent investigation to determine whether or not the statements, particularly those statements I just read to you in paragraph 26 of the Complaint, were well grounded in fact?

MR. COOTER: Do I take it by "independent" you mean other than that conducted by his counsel?

MR. FAVRETTO: On his own. That's correct.

MR. COOTER: Other than what we did.
THE WITNESS: No, I did not.

BY MR. FAVRETTO:

Q Do you have any independent basis for stating that this statement is true and correct, other than what counsel told you?
MR. COOTER: Other than what we told you.
[12] THE WITNESS: No, I don't know any.

BY MR. FAVRETTO:

Q Did you say you do not know anything else, other than what counsel told you about this assertion in the Complaint?
A That is correct.
Q When you signed the affidavit which we read earlier in this deposition which states that, "The facts set forth in the foregoing Complaint are true and correct to the best of your information and/or belief"—
A Yes.
Q —you did not have any knowledge, information or belief that was independent of what counsel told you; is that correct?
A I know—I mean, from my counsel, which is—
MR. COOTER: You may not tell him what I told you, is the long and short of it. Just tell him yes or no. Did you know anything other than what we told you?
THE WITNESS: No.
MR. COOTER: He trusts us, as well he should. Having gone through this futile exercise, Mr. Favretto, in your moving papers somewhere pursuant to Rule 11 you [13] indicated that you would be happy to depose Mr. Dashtara or myself or other representative of my law firm with respect to what independent investigation we made prior to the filing of the Complaint to determine whether or not we could file it in a good faith belief that it was true. I will be happy to submit myself or

other member of my law firm for deposition for that limited purpose without in any fashion waiving any attorney-client privilege or without in any fashion suggesting that I am a proper witness in this case. If you want to do that, I will be happy to give you all the information you want. Obviously, Mr. Dashtara, as you know from the response to Rule 11, didn't make the investigation. We did, and now it's crystalline.
MR. FAVRETTO: Mr. Cooter, I appreciate your offer. This is Mr. Dashtara's deposition, and we are going to proceed.
MR. COOTER: You can ask him whatever you want. I am just suggesting to you that, as a practical matter, he said what he said, and the facts are fairly obvious, and if you wish to proceed, we will be happy to sit here, but he is not to disclose privileged information.
MR. FAVRETTO: I understand what you are saying, [14] but I find it to be a peculiar situation when a principal of a firm verifies a Complaint as true and correct and then has absolutely no independent basis for the truth of the allegations made in the Complaint.
MR. COOTER: Mr. Favretto, I have been a litigator for a long time, and my experience is it is not in any fashion peculiar, depending on the allegations.

(Discussion off the record.)

BY MR. FAVRETTO:

Q Mr. Dashtara, what lawyers at Mr. Cooter's law firm advised you about these allegations sufficient to allow you to form a belief that they were true and correct?
A Mr. Cooter. Mr. Cooter is the attorney I'm dealing with. I believe him.
Q Did you have any discussions with any other lawyers at Mr. Cooter's firm?
A No.
MR. COOTER: Well—
THE WITNESS: I mean I had—

MR. COOTER: You may answer that yes or no. You may not tell him what we talked about. Have you ever talked to any lawyers, other than me, at my law firm?
[15] THE WITNESS: Yes.

BY MR. FAVRETTO:

Q Did you talk to any lawyers, other than Mr. Cooter, about the allegations in this Complaint?

MR. COOTER: You may not testify as to substance of questions. I instruct you not to answer. You can ask him who he talked to. You can't ask him what we talked about.

MR. FAVRETTO: I asked him, Mr. Cooter, whether he talked to any other lawyers at your firm about the allegations in this Complaint. That's the question.

MR. COOTER: Fine. I instruct you not answer. It seems to me that it goes to the substance of the conversation. I have already offered to make our lawyers available to you, sir. I instruct him not to answer.

MR. FAVRETTO: On what grounds? May I ask?

MR. COOTER: Privilege.

MR. FAVRETTO: I am asking for the identity of the lawyer with whom Mr. Dashtara discussed the allegations in this Complaint to which he subscribed his name.

MR. COOTER: You may ask him, Mr. Favretto, who in my law firm he talked to about any specific subject matter. As you [16] know, this is one of several lawsuits. If you want to ask him that, I will let him answer it. If you want to ask him what we talked about or a question which leads to what he talked about, I will instruct him not to answer.

MR. FAVRETTO: Mr. Cooter, I would just not want to prolong this, but I would ask you to reflect upon your position. Mr. Dashtara has just told me that the sum and substance of his information and belief is derived from counsel. I have asked him what counsel. He has said you, and then I have asked him who else, and he won't answer.

MR. COOTER: Mr. Favretto, I suggest you reflect on your position. I have offered to make the lawyers available who have firsthand knowledge with respect to the inquiry made. Just because his knowledge is derivative from the law firm does not mean that he is required to disclose privileged conversations between himself and counsel, nor will I allow him to. I instruct him not to answer. I would be happy, pursuant to your papers, to give you people who can answer your inquiry.

MR. FAVRETTO: So that you absolutely understand—

MR. COOTER: It is clear.

MR. FAVRETTO: —what I am asking—

[17] MR. COOTER: I understand.

MR. FAVRETTO: I am just asking for the name of the lawyer at your firm who gave Mr. Dashtara sufficient information for him to form a belief that the data in this Complaint is true and the allegations were true.

MR. COOTER: To that he has answered me. It is me on whom he relied. That is what he said, and that is the extent of your inquiry.

MR. FAVRETTO: Was there anyone else upon whom he relied at your firm?

MR. COOTER: That is a different question.

BY MR. FAVRETTO:

Q Mr. Dashtara, was there anyone else at Mr. Cooter's law firm upon whom you relied?

A No. It was Mr. Cooter.

Q Let me make sure you understand the question. Was there anyone else at the law firm upon whom you relied to form your belief as to the truth of the allegations in this Complaint?

A That was Mr. Cooter, I said.

Q It was only Mr. Cooter; is that correct?

A Yes.

[18] MR. FAVRETTO: Can we have a short recess?

(Discussion off the record.)

MR. FAVRETTO: Back on the record.

BY MR. FAVRETTO:

Q Mr. Dashtara, I would like to read to you the second sentence of paragraph 26 in Deposition Exhibit Number 1, and I quote, "Upon information and belief, either as a condition of the exclusive retailer status or by agreement with the retailer, Hart, Schaffner and Marx and Hickey-Freeman men's suits are sold by the retailer at the defendant's suggested retail price or at an artificially high price." Did you have any independent belief or reason to believe that that allegation was true, other than what counsel told you?

A No.

Q Did you conduct any investigation on your own to verify the truth of that assertion?

A No, I did not.

Q I would like to read to you paragraph 27 of Deposition Exhibit 1. "In addition, upon information and belief, for several years continuing to the present time, Hartmarx, Hart, Schaffner and Marx, Hickey-Freeman and the [19] other exclusive retailer agent co-conspirators have combined, conspired, and agreed with one another to fix prices and eliminate competition in the sale of Hart, Schaffner and Marx and Hickey-Freeman suits and to otherwise restrain trade in the sale of better men's suits." I again ask you, Mr. Dashtara, did you have any independent basis for subscribing to the truth of that allegation, other than what counsel told you?

A No, I didn't.

Q Did you conduct any independent investigation into that allegation before subscribing to the affidavit?

A No.

Q If I went through this Complaint paragraph by paragraph—

MR. COOTER: Good.

BY MR. FAVRETTO:

Q —and asked you the same questions—

A Yes.

Q —would your answers be the same in every instance?

A Yes. I mean, it depends.

MR. COOTER: Strike that. To save time, let's go off the record.

[20] MR. FAVRETTO: No, she can't—

MR. COOTER: What do you mean, she can't go off the record? She can go off the record if you let her go off the record. Do you want to let her go off the record to save time? I would be happy to clear this up for you.

MR. FAVRETTO: Off the record.

(Discussion off the record.)

MR. FAVRETTO: Would the reporter read back the previous question.

(Whereupon, the record was read back by the reporter.)

BY MR. FAVRETTO:

Q Let's ask the question again. Mr. Dashtara, if I went through this Complaint paragraph by paragraph and asked you the same question, namely, whether or not you had any independent basis for verifying the truth of the allegations made, other than what you received from counsel, would your answer be the same?

A Yes.

Q Am I correct in understanding, then, that with respect to this Complaint you have no independent knowledge of the truth or accuracy of the allegations except what was [21] told to you by counsel; is that correct, sir?

A Yes.

MR. FAVRETTO: Your witness, counsel.

MR. COOTER: No questions. He waives.

(By stipulation of counsel, in the presence of the witness, reading and signature waived.)

(Thereupon, at 1:30 p.m., the above proceedings concluded.)

(Certificate of Notary Public Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

Courtroom No. 21
Washington, D.C.

Friday, June 15, 1984

The above-entitled matter came on for a Rule 1 Motion before The Honorable Oliver Gasch, United States District Judge, at 2:02 p.m.

[2] PROCEEDINGS

THE DEPUTY CLERK: Civil Action No. 83-3568, Danik versus Hartmarx Corporation, et al. Mr. Cooter and Mr. Kudon represent the plaintiff; Mr. Ryan, Mr. Gary and Mr. Favretto represent the defendants.

THE COURT: I think you're a little bit off on that. It's Mr. Favretto represents the counter-defendant, plaintiffs and counter-defendant.

It's your motion, Mr. Favretto.

At the outset, I will state for the record, that I read Mr. Cooter's letter suggesting the Court recuse. I take it as a motion. It's denied.

MR. FAVRETTO: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. FAVRETTO: In Civil Action 83-3568, which is one of three cases involving the parties, Danik, Inc. and various Hartmarx subsidiaries, I do represent the defendants. In that class action, Your Honor, Danik is the plaintiff, and Hartmarx Corporation, Hickey-Freeman Company, Inc., and Hart Schaffner & Marx are the defendants.

The case was a class action complaint filed on November 29, 1983, alleging a variety of antitrust violations

against the defendants, including resale price maintenance, boycotts, territorial restrictions, all based upon some type of exclusive retailer policy. I will address those [3] allegations in the course of my argument, Your Honor.

Today we are before the Court on the motion of the defendants, Hartmarx and the two Hartmarx subsidiaries, for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

This case we are discussing today, Your Honor, by the way, was dismissed by the plaintiff voluntarily on April 30th, 1984, five months after the commencement of the action, and after the defendants had filed a motion to dismiss and the Rule 11 motion, as well as after a reply had been made to those motions by the plaintiffs, and a response to those replies had been filed by the defendants.

The issue before us today, Your Honor, involves Rule 11 of the Federal Rules of Civil Procedure. The question is really one which deals with what efforts are required of counsel and of parties in Federal actions, to determine the merits of potential lawsuits before complaints are filed in Federal District Court. Reasonable efforts, Your Honor, are mandated by Rule 11. The plaintiff or the moving party in any proceeding in a Federal Court must satisfy himself or itself by reasonable efforts and by a reasonable inquiry that the pleading they file is well grounded in fact and warranted by existing law or a good faith argument for the extension of existing law.

Rule 11 was amended in August of 1983 to provide [4] for very specific obligations on the parts of attorneys practicing before the Federal Court, and I quote, just briefly, Your Honor, from the Rule:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry"—those words were added in the August 1983 amendments—"it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Upon a finding by the Court that Rule 11 has been violated, that this obligation imposed by Rule 11 has not been satisfied, the Rule provides that:

> "the court shall impose"—and I underscore the word "shall," Your Honor—"upon the person who signed the pleading, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because [5] of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

Our position today, Your Honor, on behalf of the Hartmarx defendants is simply that if there is ever a case where Rule 11 sanctions are warranted, and where a demonstration has been made that Rule 11 has been violated, it is the case before Your Honor today.

The 1983 amendments to Rule 11, as I indicated, Your Honor, revised the language of the Rule to emphasize the responsibilities of attorneys. No longer is it necessary to prove that the Rule was willfully or intentionally violated. The standard is simply reasonableness under the circumstances.

The Rule imposes an affirmative duty on a lawyer—and a lawyer cannot simply rely upon his client—of conducting a pre-filing inquiry into the facts and law underlying the complaint that he files. The belief of a lawyer that his cause of action is well grounded in fact and law must be formed after a reasonable inquiry. Bad faith is not the test. Subjective intent is not the test. The

objective reasonableness of the pre-filing inquiry is the sole test.

The courts have applied this Rule in this fashion, and in preparing for this argument today, I found a recent case in April of 1984 from the Southern District of New York, District Judge Knapp, which I think best summarizes the [6] standard under the new amendments to Rule 11. The case I'm going to quote from, Your Honor, is available on Lexis, and it's Wells versus Oppenheimer & Company, Inc., et al. In that case, Judge Knapp was faced with whether or not Rule 11 had been violated by the defendants in filing a motion for summary judgment. The judge denied the motion for summary judgment, finding that there was—there were disputed issues of fact clearly reflected in the deposition transcripts, and the plaintiff then filed a Rule 11 motion to retrieve or recapture the costs of responding to defendants' summary judgment motion.

I now quote from the Court's opinion:

> "In opposing plaintiffs' consequent motion for attorney's fees, defendants' counsel have gone to great lengths in describing their research and their reasons for believing their motion to have been valid. Having no reason to doubt the veracity of counsel, we must conclude that they acted in subjective good faith in bringing the motion.
>
> "The question therefore presented under Rule 11 is: must there be a finding of subjective bad faith before sanctions may be applied? It seems to us that the question answers itself. Given the nature of advocacy, it would be well nigh impossible ever to establish that an advocate acted [7] in subjective bad faith.' If that were the criteria, the Rule might as well be repealed.
>
> "We think, therefore, that the Rule must mean that the Court may impose sanctions where it finds that there is no objective basis for an attorney's belief that a motion"—in that case, a summary judgment motion—"is 'well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' "

In that case, Judge Knapp went on to find that there was no such basis, and accordingly granted the plaintiffs' motion for sanctions; I should add, in the interest of completeness, reserving the full amount of the fees to be awarded on the sanctions motion until the end of the action that was before the judge. In this case Your Honor would not have that concern, because this action has come to an end as a result of the dismissal voluntarily entered by the plaintiff on April 30th.

One further observation about Rule 11 before entering into the argument of its application to this case, Your Honor, is that while the standard for a violation is an objective standard under the new Rule, in imposing sanctions, the advisory committee notes to the Rule—and I would refer the Court to those advisory committee notes, [8] because I think they are a very good synopsis of what the revisions were intended to accomplish last August in 1983—the advisory committee notes indicate that in imposing sanctions, the Court should take the actual or presumed knowledge of the attorney into account at the time that the attorney signed the complaint. So in imposing sanctions, the Court—it's a discretionary matter. The Rule provides that the Court shall impose sanctions once the Court is satisfied that a violation has occurred, but the amount, the nature, the severity of the sanctions are, of course, within the Court's discretion, and in reaching that determination, the Court can take all factors into consideration.

Our case, Your Honor, we believe fits well within the standards, and is a very appropriate one for sanctions. Your Honor is familiar with the background of the litigation between the parties before you. It started in June of 1983 as a collection action, which was met by a counter-

claim in that action by Danik, and one of the principals of Danik.

In November, the plaintiff, Danik, approached attorneys for Intercontinental, which is another Hartmarx subsidiary, and indicated that they were prepared to file two class actions, one involving a Robinson-Patman Act claim, similar to the one in the Intercontinental case, and the other one, the case which is before Your Honor today. After some discussion, plaintiff did carry through and filed those two [9] class actions. Both class actions were dismissed on April 30th, 1984.

The record in this case, Your Honor, is unusually complete for a motion of this sort. The Court has before it the briefs on the legal merits, the deposition of the president of Danik, who signed and verified the complaint in this case, the lawyers' affidavits from the plaintiff, that describe the extent of the investigation they conducted before filing the complaint. We rest on that record, Your Honor. We think it's unusually complete in a situation of this sort, and we think it speaks for itself.

If there's one document in the file before the Court that we could refer the Court to, we would refer the Court to the reply memorandum filed by the defendants, the Hartmarx defendants, on April 9, 1984, summarizing our belief and our position as to why Rule 11 was violated in this case. That reply memorandum was filed after we had had an opportunity to see the extent of the investigation conducted by the plaintiff before they filed this case.

Now, the class action invoves, in general terms, Your Honor, sweeping nation-wide antitrust allegations: price fixing, territorial restrictions, group boycotts, and other unspecified acts of monopoly, and other anticompetitive activities.

All of those allegations in the class action [10] complaint refers to as "an exclusive retailer policy." The defendants are charged with having an exclusive retailer policy, which is defined in the complaint as a policy of

selling their Hart Schaffner & Marx and Hickey-Freeman branded suits to only one retailer in every major metropolitan area. That is the fundamental factual allegation in the complaint. All other allegations are alleged to flow from that factual allegation, and are no more than conclusions.

The exclusive retailer policy allegation is repeated no less than 20 times in the class action complaint. Stripping everything away from the complaint, the essential assertion and the essential dispute, if you will, which the plaintiff seemed to have with the Hartmarx Corporation and its two subsidiaries sued in this case were that Hartmarx would not sell its Hickey-Freeman suits and its Hart Schaffner & Marx suits to the plaintiff. They continued to complain throughout that complaint, and it was made clear in their papers filed in this case thereafter, that that was their fundamental concern, that we would not deal with them. Of course, under the antitrust laws, a company has an absolute right to deal with whomever it pleases.

This fundamental complaint and its fundamental assertion led to a class action allegation in the complaint that was filed, which included allegations of resale [11] price maintenance, and as I said, boycotts and territorial restrictions, among others. Also filed with the complaint was a motion for class certification, and voluminous papers seeking to justify the plaintiff bringing this case as a class action on behalf of all other retailers nationwide who did not buy Hart Schaffner & Mark and Hickey-Freeman suits from the defendants.

After the complaint was filed in late November of '83, we conducted our investigation with our client, and we moved to dismiss on January 27, 1984 on the following grounds: number one, and most fundamentally, the defendants in this case do not have and did not have at the time and never have had an exclusive retailer policy, as alleged in the complaint. We sold ourt Hart Schaffner & Marx suits and our Hickey-Freeman suits to hundreds of

retailers throughout the country. We filed sworn affidavits by our executives attesting to this fact. We have multiple retailers in most metropolitan areas. We also filed sworn affidavits which attested to that fact as well.

Moreover, we argued that we had a legal right to deal with whomever we pleased, that the conclusory allegations of boycott and price fixing were unsupported by any factual assertions beyond the exclusive retailer assertion.

Moreover, we argued that exclusivity, even if we had such a policy—and we did not—was valid under existing [12] precedent, and perfectly valid under the antitrust laws.

Lastly, we argued that the plaintiff had no standing as a competing retailer, who had never been a customer of ours for the suits in question, to complain about resale price maintenance, because if there was a conspiracy that kept the prices of competing suits higher in the marketplace, the plaintiff could only profit from such a conspiracy, because he would be free to sell his suits below the fixed price.

The flimsiness and lack of basis in the complaint caused us, Your Honor, to file a Rule 11 motion. We filed it immediately after we fined our motion to dismiss, approximately five to six days later, in early February, 1984. I think it was February 2nd, 1984, to be exact.

We couldn't understand what could lead the plaintiff to make these allegations, which had no apparent basis in fact, and had no apparent basis in law. We sought to make inquiry of the president of the company who had verified the complaint by sworn affidavit. That deposition, after some objection and resistance from the plaintiff, was taken approximately a month after we filed our motion on February 29.

The President of Danik M. John Dashtara. He is a 90 percent owner and founder of the company. He swore in an affidavit attached to the class action complaint that

the [13] allegations were true and correct to the best of his information and belief.

I would recommend the reading of Mr. Dashtara's deposition to Your Honor. It's only a 20-page deposition, a 21-page deposition. Mr. Dashtara told me, much to my amazement, that he knew nothing whatever about the allegations in the complaint, which could have been derived from any independent investigation. Simply stated, he made no independent investigation. He relied upon what his lawyers told him. I was left with a question in my own mind, why he had verified the complaint in the first place.

In any event, shortly before we took Mr. Dashtara's deposition, the plaintiff responded with his answer to our Rule 11 motion and to our motion to dismiss. That response attached to it four affidavits, three from lawyers in the firm representing the plaintiff, and one from a secretary in the firm.

The lawyers' affidavits proved our suspicion, and they established our right to sanctions. Nevertheless, Danik stood by its complaint and did not dismiss its complaint. It continued to press the allegations, which had been demonstrated to be baseless on the factual record.

Now, Your Honor, it was only after our reply to the Rule 11 motion, the brief I referred Your Honor to this morning earlier, that was filed on April 9, 1984, that made [14] our case as to why Rule 11 was violated in this proceeding, that the plaintiff voluntarily dismissed this suit on April 30th. They tried to walk away, Your Honor, but the damage had been done. If Rule 11 means anything, it means that the Court may properly reimburse litigants who have been put to the expense of answering a frivolous lawsuit which had no basis in fact, and which had not been adequately investigated.

Now, why was Rule 11 violated in this case? Simply stated, there was no reasonable inquiry by anyone into the allegations prior to the filing. The undisputed record,

the affidavits and Mr. Dashtara's deposition establishes this. There's no need to look any further.

One of the lawyer's affidavits was filed by Mr. Cooter, lead counsel for the plaintiff. Mr. Cooter conducted no investigation. He was told by his client that his client had been unable to buy Hickey-Freeman and Hart Schaffner & Marx suits, and that those suits were only sold by Raleighs within the District of Columbia. He left all filing investigation to his colleagues.

Mr. Cahill, a partner of Mr. Cooter's, undertook to conduct the investigation. He telephone a number of retainers in Baltimore, and the term "a number of" is used in his affidavit. Only one such retailer is identified in the affidavit.

He asked those retailers if they carried Hart [15] Schaffner & Marx suits. Only one of those retailers said that it did. This telephone call was made on or about November 4, 1983. That was the extent of Mr. Cahill's personal investigation, so far as his affidavit reveals.

Mrs. Reid, a secretary at the law firm, was asked by Mr. Cahill to call retail stores in Washington, D.C., New York City and Philadelphia, and to ask if they sold Hart Schaffner & Marx suits. Mrs. Reid called about eight retail outlets in the District of Columbia, and talked to unidentified salespeople at those stores. They advised her that they did not carry Hart Schaffner & Marx suits. Two of those retailers, again unidentified, told her that Raleighs was the only store they knew in D.C. that sold Hart Schaffner & Marx suits.

She called four retailers in New York City. Salespeople answered the phone at those stores, and said they didn't sell Hart Schaffner & Marx. One person told her that Wallach's, a store in New York, was the only store he knew of that sold Hart Schaffner & Marx suits.

In fact, Your Honor, there are three stores in New York City that sell Hart Schaffner & Marx, including Barney's, which is one of the largest retail locations on

the East Coast. There are 20 stores that sell Hickey-Freeman suits in New York City.

Mrs. Reid then called Philadelphia, and she called [16] four stores. One store was out of business, and she found out from her phone calls that only Wanamaker's sold Hart Schaffner & Marx suits in Philadelphia. In fact, there are seven Hart Schaffner & Marx retailers in Philadelphia, and three Hickey-Freeman retailers.

So the investigation conducted by the lawyers amounted to only one lawyer making one call, one series of calls to one city on one day; a secretary at the firm made a series of calls to three other cities. The only question asked was whether or not the stores contacted sold Hart Schaffner & Marx suits, and whether those stores knew of anybody else that sold Hart Schaffner & Marx suits.

No other questions were asked. No inquiry about price fixing, no inquiry about boycotts, no inquiry about territorial restrictions, no inquiry about whether these retailers had ever sold those suits and had been cut off, whether they had ever tried to buy those suits—no inquiry at all. Most importantly, no inquiry at all about Hickey-Freeman. The only inquiry was made about Hart Schaffner & Marx. Yet, they sued Hickey-Freeman Company as well as Hart Schaffner & Marx, but they never even asked a question about Hickey-Freeman. They did nothing, Your Honor. It boils down to that, they did nothing.

The important point from this inquiry—and it's revealed in the record by their own admission—is that, as [17] I said, there was no inquiry into Hickey-Freeman's policies, and there was no inquiry into the substantive allegations in the complaint: resale price maintenance, boycotts, and territorial restrictions.

Furthermore, Your Honor, there was no adequate inquiry into the class action allegations. They called retailers, anonymous retailers in four cities in the Northeast part of the country, and then they brought a class action complaint.

So we think on a number of different independent bases, the pre-filing investigation was lacking in reasonability, and doesn't meet the standards of Rule 11. No questions about Hickey-Freeman; no questions about substantive antitrust violations; and inadequate follow-up on class action allegations, which formed the basis for their class action suit.

On the basis of the investigation I've just described, Mr. Cooter and Mr. Cahill signed the complaint which initiated a class action, nation-wide antitrust case. Mr. Dashtara, the President of the plaintiff, verified the complaint, although he admitted he knew nothing from any independent source about the allegations in the complaint.

After we filed our motion to dismiss and the Rule 11 motion, laying all of this out about our policies, they did not withdraw the complaint. Instead, they sent [18] another one of their lawyers to the telephone to conduct additional inquiry. This inquiry is reflected in the affidavit of Nicholas Hantzes, H-A-N-T-Z-E-S, a colleague of Mr. Cooter's at the law firm representing the plaintiff. His affidavit makes very interesting reading as well, Your Honor, because as pitiful as his follow-up investigation was, when he called three retailers in Philadelphia, a number of retailers in Boston, and one retailer in Los Angeles, his investigation established by his own admission in the affidavit, that we did not have the exclusive retailer policy which they alleged in their complaint. He found that in Philadelphia, two retailers sold Hickey-Freeman suits; he found in Boston that three stores sold Hart Schaffner & Marx suits. Nevertheless, their complaint, which they stood by and attempted to defend in their response, charged an exclusive retailer policy, which meant only one retailer in every metropolitan area.

Now, Mr. Hantzes' affidavit of his post-filing investigation—and I should add to the Court that Rule 11 requires the pre-filing inquiry—to the extent that Mr. Hantzes conducted a post-filing inquiry, it's really beside the point

as to whether or not they violated Rule 11 by the nature of their pre-filing inquiry. But in any event, it's interesting, because the post-filing investigation conducted by Mr. Hantzes established in their own minds that [19] we didn't have the policy that they charged us with, and instead of withdrawing the complaint at that time, they concocted a confused and outlandish theory that said, along these lines, Your Honor: "Well, you may not sell to only one, but you only sell part of your line to one and part of your line to somebody else, and you only sell to Big and Tall Shops"—it was just a confused—in other words, Your Honor, we didn't sell to only one in every area, maybe we sold to more than one, but in their view, it wasn't enough. So that's what they came up with in response, and that's what they pressed upon the Court at that time.

Well, we replied in our Rule 11 reply, and we pulled these facts together for the Court, and it establishes that far from withdrawing when they should have withdrawn this complaint, when they proved themselves that we didn't have the policy that they charged us with, when they hadn't conducted any investigation whatever into the substantive allegations that they made, they pressed ahead in the face of our sworn affidavits, in the face of their own subsequent investigation. They withdrew the complaint only three weeks after we had filed our reply brief on the Rule 11 motion.

Now, the principle at stake, Your Honor, is that you don't make allegations in Federal Court without an adequate basis. That is especially true when you are already in litigation with the party you are going to proceed against.

[20] As I indicated at the beginning of my argument, we were already in litigation with these people over the collection action and over the Robinson-Patman Act counterclaim. They came to us and said that they had evidence of additional antitrust violations, and they threw the class action complaint which is the subject of this

motion on the table, and then they filed it two or three weeks later, after attempting to engage us in a settlement discussion.

Now, there may be nothing wrong in principle with someone wanting to resolve all disputes between the parties to litigation, but certainly, when you're in litigation, the standard of care which should be demanded of a party who is going to bring additional charges against you ought to be intensified, it ought to be heightened, and what we say is they did nothing, and that is revealed in their affidavits, and they filed this class action against us. It was a massive class action, and corporations must respond when someone hits them with an antitrust class action.

Very serious allegations. The case received publicity in the Washington Post and in trade journals, and it caused Hartmarx enormous expense. We had to file a motion to dismiss; we had to file a Rule 11 motion; we had to reply to the plaintiff's responses to those motions; we had to conduct our own investigation; we had to talk to the executives in the company, and it went on for five months. They can't walk [21] away, Your Honor. The harm is already done. The process has already been abused, and they have literally no defense.

We believe that the facts that are outlined in our papers, and which I have gone over today, warrant the imposition of substantial sanctions. The expense was great for the defendant. There was no cause for them to do this to us, absolutely none. The have now walked away, and they had no cause to bring it in the first place.

The standard is an objective one, Your Honor. Deterence is an important function of Rule 11, and we respectfully ask the Court to impose sanctions of substantial degree, and we would be ready in connection with that decision, if the Court should deem it appropriate, we would be ready to supply whatever information would be necessary to support the imposition of sanctions in this case, including attorney's fees. Thank you, Your Honor.

THE COURT: All right.

MR. COOTER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. COOTER: Your Honor, for the record, I'm Dale Cooter on behalf of the plaintiff in this case, Danik, Inc., and I think I can respond to Mr. Favretto's rather impassioned plea for sanctions, simply by explaining in a basic fashion what happened here with respect to the course of the litigation chronologically, the course of the [22] discussions between Mr. Favretto's law firm and my law firm with respect to that ongoing litigation, the nature of the inquiry made, and last but not least, the truth of the allegation, because as we stand here, it be true. That's our position.

What they call this collection action which was commenced, at least in our view, never was a collection action. It is more likely or more accurately characterized as a major antitrust case involving millions of dollars in price discrimination.

My first contact with this piece of litigation as Mr. Favretto has described the litigation—and Mr. Favretto's law firm was pursuant to the Court's order, that counsel for Intercontinental in the other case meet with counsel for Danik, in an effort to determine what issues were really in the case, and to agree at least in partial form on what we all thought would be a reasonable schedule to complete the case.

I've already explained to the Court that in our initial view of the case, when the representatives of Danik came to us with t... claim, was that the allegation of pric... crimination was one that had to be investigated befo..e at least our law firm would undertake any serious discovery effort or put this defendant, Intercontinental, in the first case to any particular significant expense.

[23] So what we did was we met, I met in my office with Mr. Gary and Mr. Ryan, and I said, "What is this price discrimination all about? Are you doing it?" Mr. Gary informed me in no uncertain terms, "It did not hap-

pen. We're not doing it. It didn't happen." Frankly, Your Honor, I took him at his word at the time, and based on that conversation with Mr. Gary, we filed in the underlying case the most limited document production request available to us, to determine whether, in fact, it happened, and I told him at the time, "If it didn't happen, Mr. Gary, then we're not going to go forward with it. We'll see."

That discovery was nothing more than to pull the invoices from Intercontinental with respect to the underlying Robinson-Patman case, as to Danik, and to pull the identical invoices as to Raleighs and Syms, which we then believed to be in possession of a discriminatory pricing arrangement.

That investigation in Buffalo resulted in two findings: first, as to Raleighs, it didn't happen; Raleighs is getting overcharged more or less the same way we are. As to Syms, it happened beyond dispute. Invoices across the board for the same item, the same lot number, the same delivery time, the same everything, 20 percent less.

At the end of the first day of deposition, I said, "But Mr. Gary, you told me it didn't happen. Now, I've got these papers, and apparently it did happen." He said, "Oh, [24] no, I didn't say that. What I said was, it's not a violation."

Well, I know exactly what he said. He said what I've just suggested to the Court that he said. So at that point, I had discovered that Intercontinental was engaged in exactly the price discrimination that Mr. Dashtara told me it was.

Moreover, given—they resisted the production of some documents, notably, the Syms order sheets at that deposition, but it was fairly clear from the testimony of Mr. Hoffmann, the President of Intercontinental, that that was a discrimination which was taking place in every city that Syms did business in, which by our investigation was seven or eight. So at that point we knew that there was a substantial antitrust violation, and based on Mr. Hoffmann's testimony, we knew it to be without substantial defense, and indeed it continues to be without substantial defense.

In any event, we came back, moved to amend the complaint, did some more discovery, and that case has been ongoing, Your Honor is familiar with it, and I don't have to go through the chronology of it, but it would be fair to say that at that point, having in effect caught these folks doing exactly what John Dashtara said they were doing, having the documents to prove it, I began to pay increasing attention to Mr. Dashtara's claims with respect to antitrust violations by this Company and its parent and affiliates.

[25] Mr. Dashtara told me that he was unable to purchase Hart Schaffner & Marx brands, Hickey-Freeman brands, and that in fact there was only one retailer in the Washington area who could do that, and that was Raleighs. Moreover, Mr. Dashtara told me that it was his understanding that that was a nation-wide practice, and that the effect of the practice—as it turned out—I shouldn't be telling my opponents that I buy their goods—but I had recently gone to Raleighs and bought a Hickey-Freeman suit and Hart Schaffner & Marx suit, and I know what it cost, and it was artificially high. They told me it was artificially high, and I didn't need to be an economist to figure that out when they sent me the bill.

As a practical matter, then, the issue became that, given the fact that John Dashtara had been undeniably right once, and he says that there is still more antitrust violation, and given the fact that we knew at that point that Intercontinental was engaged in a substantial antitrust violation, the issue became whether or not he was injured by still other practices, predatory practices of this Company.

At that point we knew that Hartmarx was a major, probably the major manufacturer, when you take the whole Company together, of men's suits in this country. Our information was that it was 60 percent, 65 percent of the [26] market. I'm not clear if that's right or not,

but there was no doubt about it: a big manufacturer, they controlled huge numbers of designer lines, all of them that I ever heard of at that point, and with the significant piece of the market, and we knew that because we had their 10-K and their annual report, and it said in glowing terms, "We're a great big Company, and we control everything," in effect.

We then undertook to verify whether or not Mr. Dashtara's allegations were correct with respect to an exclusive retailer policy, and I instructed people in my law firm to call three or four major metropolitan areas. We didn't call Butte, Montana. I wanted to call New York, Philadelphia, the big ones, to determine if, in fact, that policy existed, and if it did, to reach reasonable conclusions, based on what we already knew with respect to whether it had antitrust impact.

Mr. Cahill called Baltimore—we called Baltimore, Philadelphia and New York. Baltimore Mr. Cahill already knew something about, 'cause he lived there, or did at one point. But he made the calls and concluded that there was one retailer in Baltimore that sold this stuff. In New York, our information from our calls to these retailers were there was one retailer in New York that sold this stuff, and in effect, buttressed our conclusion or buttressed what John Dashtara had told me, and again he had a track record at that [27] point. He'd been right once, to the effect that there was in effect an exclusive retailer policy by Hartmarx and its subsidiaries in those two lines of suits, and those two lines are major lines.

Based on that information, I concluded that there was a case, an antitrust case to be made on that issue. We made the relevant allegations. There was a 12(b) motion filed, and I'll proffer to the Court that, had that 12(b) motion been heard, the allegations were well pled, and it would have survived 12(b).

In any event, we made the allegations, and by the way, at that point in time, I consulted with an antitrust expert—I'm not an antitrust expert, I'm a litigator. I'll even tell you who he is. He was a former Chief of Litigation at the Federal Trade Commission, done substantial amounts of antitrust work, and I brought him in, and I said, "You tell me what this is, tell me what this is about. What do I have here?" He said, "You have two very substantial antitrust class actions, based on the information and the results of that investigation."

Based on our investigation, our conversations with Dashtara, our conversations with an expert, I concluded there was a sufficient basis to file that lawsuit, and we did.

The interesting and perhaps the most telling thing in this case is, though, that I didn't file it immediately. [28] What I did was draft it. We put it in the form at which it ultimately reached the Court, save for a modification or two, nothing substantial. It was substantially complete and in final form when I called the general counsel for Hartmarx in Chicago. Hartmarx at that point was not a party to any ongoing litigation, although Hartmarx was also to be represented—and I think his name was Stewart, Charles Stewart—by the Mayer, Brown & Platt firm. Mr. Stewart and I had a short conversation, and I said, "Mr. Stewart, I'm a lawyer in Washington, and we have uncovered what we believe to be substantial antitrust allegations concerning Hartmarx and several of its affiliates." Mr. Stewart said, "Tell me what the nature of those allegations is in broad brush form," and I did. I explained to him that there was one action which we said involved price discrimination in favor of Syms in every city where Syms did business, and that the second lawsuit was an allegation of a restrictive dealership policy, which resulted in artificial price maintenance by way of conspiracy and group boycott. I told him what it was.

I said, "Now, Mr. Stewart, before I file it, maybe it would be useful that we have a talk. Let's talk about it." Mr. Stewart said, "Fine." I told Mr. Stewart, and frankly, there's been a whole lot made of the fact that we

gave them advance notice of the suit, in terms of some evil or untoward [29] motive of ours. The motive of ours at that point was exactly what I told Mr. Stewart, and that was, "Mr. Stewart, here's what it is, here's what we think we have. Let's sit down and talk about it," so that if it not be so, presumably Mr. Stewart is going to call me back, and he's going to say, "But, Cooter, you've blown it. You're just completely incorrect on this issue."

I told Mr. Stewart that I would kindly send it to him, be happy to wait—I think it was a week or ten days—to hear from him, and he thanked me for my courtesy—he thanked me; he told me it was a courteous phone call—thanked me for my courtesy. We sent the documents up there to Mr. Stewart forthwith.

At the end of—strike that. Either that very day or the next day, I went to the Washington office of Mayer, Brown & Platt, and met with Mr. Gordon and Mr. Gary, and gave them copies of what I had given to Mr. Stewart, and said, "Gentlemen, here's what we think we have. Now, if we're going to talk, maybe we should talk."

Mr. Gary and Mr. Gordon didn't say anything at that meeting. I told them I would be happy to give them whatever time they needed to review that material, and we agreed on the same week to ten days with Mr. Gary and Mr. Gordon.

At the expiration of the time—it was either—I think it was Mark Gary who called me—one of the lawyers [30] from over there called me and said, "We need more time to look at this stuff." I said, "Fine. What do you need?" I think it was another week. I said, "Fine, you have another week, whatever you want. We'll sit and wait to hear from you."

At the expiration of that week, I received another call from Mr. Gary, saying that they wanted to talk.

I had a conversation with Mr. Gordon, whom I perceived to be Mr. Gary's superior at that time, with respect to whether or not they wanted to talk substantively, or whether they wanted to talk about a payment term on

what they kept saying in their papers was a collection case. I told Mr. Gordon I was not inclined or the purpose of those pleadings, both class actions, were not designed to serve as defenses for a 100,000-dollar claim. I had a lot more money than that in them, probably, at that point.

Mr. Gordon indicated to me he understood that, and that somebody would get back to me. They got back to me shortly, and told me that they had no interest in pursuing a discussion with me at the time, and I could go ahead and file my lawsuit, and I did.

Now, never in the course of any of those conversations, did any of those people say this didn't happen. I mean, they'd said that before. I'm not sure I would have believed them. But the point is that they never [31] said, "Wait a minute, we got 16 retailers in New York," or "We've got seven in Dallas," or whatever it is they filed later by way of affidavit. They never said that the exclusive retailer policy that we alleged was anything but a fact, and indeed, they knew that our most firsthand information, our best source of information would be in the Washington market, as opposed to elsewhere, we being here, whatever the investigation. Never did they say it didn't happen. In fact, in Washington, it's true, and it turns out, Raleighs is an exclusive dealer. They never said anything. They told me go ahead and file my lawsuit. I did what they asked me to do in that regard.

Now, what happened then was, they filed a 12(b)motion, as I recall it. There was a dispute about the timing of the thing, as I remember it, but they filed a 12(b) motion that said that the pleading was insuffcient to state a cause of action for all of those reasons that antitrust lawyers like to argue about, which always give me a headache. But that was—that's all they said. They didn't say it isn't so. They said it doesn't state a cause of action, as it says.

We had reviewed it. We thought it did. We did a bunch of research. We thought it did. We filed an opposition to that 12(b) motion. That motion was pending. I

assumed at that point that that was their position, that [32] the position wasn't that it didn't happen, that the position was that if it happened, it didn't state a cause of action, as we pled it.

Shortly thereafter, we get served with a Rule 11 motion, which is the motion which is before Your Honor, saying that in attaching affidavits they said they got 16 retailers in New York, and they've got 32 in Detroit or whatever that thing said, and frankly, I was surprised. I was surprised, a, that they'd filed the motion, and b, at the substance of the affidavits, because at that point—and we're three months into the case, long after I first talked to them—that's the first I ever heard that they alleged they had double digit retailers in New York. Never heard that before. Nobody ever said that.

At that point, I called my colleagues into my office, and I said, "You tell me how this could happen," thinks me. "I presume they're telling me the truth," thinks me at the time, although I had been stung once. My colleague said, "We made these calls. This is what we were told. This is what happened. That's the basis of our belief."

I said, "Well, then there is a dispute between the results of our investigation and what they say constitute the facts, and we're going to determine who's right," and so we did.

I asked Nick Hantzes to make an extensive review of [33] the situation in the markets that we talked about and additional markets, and to report back to me forthwith, because if in fact it didn't happen, I was prepared—frankly, I'm too busy to waste my time on cases that don't have merit. So never mind Rule 11, I just didn't have time to fool with it if it's wrong.

He came back to me and showed me documentary evidence that the allegations are, in substance, correct. What we found—if you go up to the Library of Congress, and you open the phone book to Detroit, you'll see a Yellow Page ad that says some company, "Exclusive retailer for Hickey-Freeman and Hart Schaffner & Marx." We discovered that in several places. I've seen three or four

of those ads in major cities. It says exclusive. It says just what it says.

The telephone calls that we made to still additional metropolitan areas led us to the conclusion—well, first of all, we couldn't tell from the affidavits that had been submitted in support of the Rule 11 motion, whether they were talking about retailers or outlets, whether one retailer was 16 stores or 16 retailers. I give them the benefit of the doubt. They must have been talking about 16 retailers, because any other thing would just mislead the Court. I can't seriously contend they were doing that, but you couldn't tell it from reading the affidavit.

What we found was that we would call the people in [34] the various metropolitan areas, and we'd say, "You have a Hart Schaffner & Marx suit?" "Yeah, about two of them. We have two of them. You can't really buy them here. If you really want to buy them, you go down the street to X, Y, Z store. They're the only people in town that carry a full line."

With respect to everything west of the Mississippi, we discovered that every more or less exclusive retailer west of the Mississippi is a Hartmarx sub. They buy retailers.

I shortly thereafter had occasion to go to San Francisco on business, and it was pure happenstance, but I'm standing there in the financial district, and I walk by a store with a gold plaque on the door, "The exclusive home of Hart Schaffner & Marx and Hickey-Freeman," or something to that effect. I don't even remember the name of the place. I was absolutely convinced at that point that the substance of the allegation with respect to an antitrust violation in the nature of a group boycott through this policy and a conspiracy to fix prices was substantially correct. I believed it then, I believe it today.

It's not a function of me coming into court and saying, "Judge, we made a reasonable investigation, but we made a mistake." I'm not saying that. I'm saying we made a reasonable investigation, and we were right in substance. [35] I will concede to Brother Favretto, that it is pos-

sible that there isn't one. What there is, apparently, is one that has the line, and a couple of others that have long and tall sizes, and a couple of others that have limited distribution, and the interesting thing about it, when you talk to the retailers, I'm told, is that the retailers are very candid to tell you, "Yea, we got a couple of those suits, but if you really want Hickey-Freeman, or you really want Hart Schaffner & Marx, you go down the street." They tell you that.

So our investigation in my view was not insubstantial at all, and in fact correct. We reached the proper factual conclusion, based on what I know today, and you can be sure that after this Rule 11 business came up, given the other problems that we've had in this case, that I was curious about it. I wanted to know if we were right, and indeed we are.

Now, the question then gets to be, "What did you dismiss for?" Frankly, Mr. Favretto would have the Court draw some connection between his Rule 11 motion and our dismissal. I'll tell you candidly, Judge Gasch, that it had nothing to do with that. We didn't care one whit about Rule 11 when it came to dismissal.

What happened was that the pending class actions, Robinson-Patman class action plus the class action as to [36] Hart Schaffner & Marx—I don't want to say pending class actions, they're a distraction, 'cause I don't mean that, but they got to be a distraction to the trial of the major case, the major underlying case where this thing all started, that being the Intercontinental Robinson-Patman Act case.

The Court set an abbreviated discovery schedule—I can't remember what—six weeks. We hadn't done any discovery at that point. We had 30 depositions to take. They had a corresponding 30—I don't remember the exact number, but I want to be accurate. We had a large number of depositions to take. They had a corresponding large number on the other side, and frankly, I'm a partner in a 12-lawyer law firm. The filing of pleadings and

responding to pleadings—I mean, in the basic case, we've got pleadings filed that are super thick. The other one was proceeding apace. We were awash with paper, and it simply got to be a distraction from actually getting down to business, and getting ready to try the underlying case.

Mr. Kudon had joined the firm at that point. He is an antitrust expert, and he convinced me that the practical thing to do in that circumstance was to nonsuit those cases without prejudice. As I stand here, if I ever find the time or energy, we may bring them again, because I think they're substantial, and I think they're correct.

In any event, given the practical problem we were [37] facing with these folks, we dismissed without prejudice, and the only reason we did that was just what I've just described to the Court. It had absolutely nothing to do with our view of the merits of their 12(b) motion, nor did it have anything to do with our view of the merits of their Rule 11 motion.

Now—

THE COURT: You knew all that at the time you filed it, didn't you?

MR. COOTER: Did what, Your Honor?

THE COURT: That you were confronted with the original suit.

MR. COOTER: I didn't—

THE COURT: And your counterclaim was an antitrust action?

MR. COOTER: I knew that, yes, sir. I had no idea at that point that the discovery schedule was going to be as tight as it was, to be candid with the Court. I think we had a discovery cut—I'm trying to remember what month this was, but I think we had a discovery cut-off—the Court ruled—

THE COURT: Today is the cut-off.

MR. COOTER: Is today the cut-off?

THE COURT: Yes, if it's not extended.

MR. COOTER: And this was 60 days ago. The Court [38] ruled on summary judgment. We had a relatively

short discovery time for this kind of a case. I didn't—the Hartmarx class action case had already been filed at that point. I never really appreciated what the nature of the discovery problem was going to be until the Court ruled on the Intercontinental motion for summary judgment. That's the first time we really knew.

THE COURT: That's just a little collection case.

MR. COOTER: What's that?

THE COURT: That's just a little collection case, as you characterized it.

MR. COOTER: Oh, I don't characterize it that way at all, sir.

THE COURT: I thought you did just a few minutes ago.

MR. COOTER: No, no, no, that's the characterization of my opponents. It's anything but a little collection case.

THE COURT: Dashtara ordered the goods, he got the goods, he sold the goods. These people want their money.

MR. COOTER: That's not my theory, it still isn't my theory.

So as a practical matter, it was one at the time—

THE COURT: You've read Bruce's Juices, haven't you?

MR. COOTER: I sure have.

[39] THE COURT: What does that tell you?

MR. COOTER: About?

THE COURT: Whether or not an antitrust claim is a defense to a collection case?

MR. COOTER: What Bruce's Juices tells me, Your Honor, is that an antitrust counterclaim is not used as a defense to a suit on an open account. That doesn't militate against the viability of an antitrust counterclaim in any fashion.

THE COURT: You can have your antitrust case. I denied the motion for summary judgment on that.

MR. COOTER: I understand.

THE COURT: But you got to pay for the merchandise you got.

MR. COOTER: Well that issue has already been determined at this point. We've posted the money. The money is in the Registry of the Court, the 108,000 or whatever it is.

Frankly, Your Honor, the fact that we posted the money should militate against the theory. I mean, it should be clear to everyone in the room now, I hope, that this Robinson-Patman case is in no way used to defeat a 108,000-dollar claim, because we already posted the $108,000, and we're anxious to go forward with that case. I could have settled that out at the first salvo, I suspect, if I wanted to do that. We're not interested in that. No indeed, it's [40] not a collection case.

In any event, that's why the class action that's before Your Honor was dismissed, and that's the only reason.

Now, what Mr. Favretto didn't give you was the case law on this issue, and there is some case law on this issue, and there's a substantial number—there are a substantial number of cases that come up by way of Rule 11 motion or 12(b) motion or summary judgment motion in antitrust cases, and the key case that really determines this—apparently, this is fairly common, for antitrust defendants to file these sorts of things, because they've got all the information. How do I know how many retailers they have, or the size of those?

THE COURT: What is this key case you're going to give me?

MR. COOTER: It's Poller versus Columbia Broadcasting System, 368 U.S. 464.

Poller came up in the context of the motion for summary judgment by an antitrust defendant short of discovery. In effect, what he said—what happened in Poller, was the same kind of thing. The filed a bunch of affidavits, saying we didn't do it, and the plaintiff, the antitrust plaintiff in that circumstance, has no mechanism to find out to a certainty, beyond the investigation that a reasonable plaintiff can do, to establish whether they're telling you the truth [41] or whether they're not tell-

ing you the truth. I mean, I've now reached the conclusion that their affidavits may not be entirely truthful, but in any event—

THE COURT: What were the facts in the Poller case? What was the cause of action?

MR. COOTER: It was an antitrust case.

THE COURT: Yes, I understand that, but the facts.

MR. COOTER: If the Court will bear with me just a moment.

It was a boycott. The—

THE COURT: Wait just a minute. The Reporter wants to change his paper.

(Brief pause in proceedings.)

THE COURT: If you'd like, I'll send for 368 U.S.

MR. COOTER: It's 360—

THE COURT: You just said 368.

MR. COOTER: I have the case here.

THE COURT: I'll send for the volume, if you wish.

MR. COOTER: Unless Your Honor wants it. I have it.

What it was, it was a Sherman case, a Sherman 1 case, apparently, that had to do with whether or not CBS in conspiracy with a radio station or television station, I guess in Milwaukee, had entered into a conspiracy to eliminate another radio or television station. CBS denied it, entered summary judgment based on some affidavits.

[42] The Court below entered the summary judgment, and when it got to the Supreme Court, the Supreme Court said, "We believe"—and I'm reading from the case at this point:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles,"—and this is the key part—"the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

> "Trial by"—a little farther down—"trial by affidavit is no substitute for trial by jury, which so long has been the hallmark of 'even-handed justice.' "

In effect—

THE COURT: In this case, I denied the motion for summary judgment in the antitrust case; isn't that right?

MR. COOTER: Not in this case, in the other case.

THE COURT: I'm talking about the case that's still pending.

MR. COOTER: The case that's still pending, you denied summary judgment, that's correct, sir.

THE COURT: All right.

MR. COOTER: But what we have in this case, that is, in the class action case which has been dismissed, about which they complained that we should be sanctioned under [43] Rule 11, what we have are them filing affidavits, saying I've got however many retailers in Detroit, or however many in New York, and saying that conclusively demonstrates the frivolity of the action.

The Supreme Court has ruled in Poller, at least with respect to antitrust cases—

THE COURT: That was not a Rule 11 case.

MR. COOTER: No, it was not; no, it was not, but the concept is the same.

THE COURT: The question before me, sir, is whether or not you made a reasonable investigation before you filed these suits.

MR. COOTER: That's correct, and the standard for that reasonable investigation in an antitrust claim is somewhat different, I suggest to the Court, than in some other cases, because when you allege conspiracy, when you allege—in complex issues, complex cases, the investigation that can be made is only what can reasonably be made. All of the documents, all of the invoices, all of the dealership arrangements, all of the agreements, all of everything that happens in that kind of case is peculiarly within the grasp of the defendant. I don't have access to their file cabinet until the case starts, so the

best we can do in that circumstance is to make a reasonable investigation to determine whether or not probable cause—you know, I hate to use that [44] term—exists to file the lawsuit. Does it look to be so, based on a reasonable investigation?

Based on the investigation that we made, at the time it looked to be so. Based on what we now know, it still looks to be so, so that the fact that they come in and file affidavits that say we didn't do it doesn't determine the issue. The issue is—I mean, it would be kind of an anomalous result for the Court to hold, you didn't make enough investigation to determine whether it be true, even though it's true, because if it's true, then it's true. If it be true—

THE COURT: That goes without saying. If it's true, it's true.

MR. COOTER: That's right, and if that's so, whatever investigation we made must have been adequate because we arrived at the right result.

Beyond that, we made the only investigation that any reasonable plaintiff's antitrust lawyer could make in that circumstance, and that is, you get on the phone, and you call some relevant markets, and you find out what's happened, and what's happened is exactly what we say has happened, so that in our view, that investigation more than passes muster.

There are some additional cases on this issue. Perington Wholesale versus Burger King—

THE COURT: Is that a Rule 11 case?

[45] MR. COOTER: I'm trying to recall, Your Honor. It has to do with pleading—yes, they speak to Rule 11. I can't remember if it came up in the context of a Rule 11 motion, but whatever they're talking about is a complaint that was pled on information and belief, and the Court reasoned that—

THE COURT: What's the citation of this case?

MR. COOTER: 631 F.2d 1369. It's a 1979 case out of the Tenth Circuit, and they ruled, following a Seventh

Circuit case, Carroll versus Morrison, 149 F.2d 404, a Seventh Circuit case, and what they rule was that in antitrust actions, where the proof is in the hands of the alleged conspirators—and then they cite Poller—allowing such pleading when the conduct complained of is otherwise fairly noticed—the question is did I fairly notice them—seems appropriate, so they found that pleading on information and belief—and that was just information and belief from the client—constituted a sufficient pleading in the context of an antitrust case.

Additionally, In re Mid-Atlantic Toyota Antitrust Litigation—this is—I think it's Judge Young's case in Baltimore; if the Court will bear with me a minute? Yes, it is, Judge Young's case in Baltimore, 525 F.Supp. 1265. It's a 1981 case. Judge Young—I can find the annotation in just a moment—

[46] THE COURT: This Burger King case you just gave me is 631 F.2d 1369; is that right?

MR. COOTER: Perington is 631 F.2d 1369, that's correct, Your Honor.

THE COURT: 631 F.2d?

MR. COOTER: Yes.

THE COURT: What was the date of that case?

MR. COOTER: A 1979 case.

THE COURT: Now, this case Judge Young handled in Baltimore—

MR. COOTER: 525 F.Supp. 1265, a 1981 case.

THE COURT: I'm a little bit confused about that. You've got a 1981 case that bears the citation and Volume 525 F.2d—

MR. COOTER: No, F.Supp. . . . It's a District Court case.

THE COURT: Oh, F.Supp., all right.

MR. COOTER: 1265 is the page.

This came up in the context of the 12(b) motion essentially filed by the antitrust defendant, to the effect that there had been an insufficient investigation, and the thing was obviously wrong, the complaint was obviously

wrong, and Judge Young found, consistent with the other cases, that in antitrust cases, a basic investigation is enough, and denied—strike that. It came up in connection with Rule 11. [47] Some of the defendants moved to dismiss the complaint for failure to comply with Rule 11, and the Court cited a number of cases to the effect that they should be stricken or dismissed only "when it appears beyond peradventure that it is a sham and false, and that its allegations are devoid of factual basis."

That had to do with dismissal of a complaint, but the test is the same with respect to compliance with Rule 11, be the remedy sanctions or dismissal. The test is whether or not there is a sufficient investigation.

In that case, Judge Young simply took an affidavit from one of the plaintiffs, which was the Deputy Attorney General of the State of Pennsylvania, to the effect that he was convinced, based on his investigation, that there be enough acts or conclusions to await discovery, because in the nature of an antitrust case you can never nail it down with certainty until the discovery is over, so—there's another one, Hughes Automotive—I mean, there are a lot of them.

THE COURT: Are they in your pleading?

MR. COOTER: I'm not clear whether these are or not, to be honest with you, Your Honor. We filed that opposition some time ago, and I'm really not clear, but in any event, it's the same thing. They cite Poller, Poller v. Supreme Court case, the key case which is supposed to determine what the standard is for review here, saying that in antitrust [48] cases, you do the best you can and await discovery. That's the effect of it.

I'll suggest we did enough, even if it wasn't an antitrust case, but in the context of the undisputed fact that the facts which would prove it to a certainty are exclusively in the hands of the defendants, not the plaintiffs, all the plaintiff can do is what he can do based on what he has, and what he has is access to the markets by way of telephone or inquiry, and access to public

documents, and that's it. The evidence, the real evidence, the hard evidence is peculiarly within the hands of the defendant, so Mr. Favretto's affidavits that he submitted, to the effect that he has some retailers here or there, don't change the fact that, based on our conversations, it appears that his affidavits—I'm not going to say they're untrue, I'm not going to say anybody committed perjury here, but they may be misleading, because if they've got 16, and 13 of them or 14 of them have two suits, then it seems to me as a practical matter that they've got—that they do have a policy of exclusivity in a given market, and if that be so, then our allegation is correct, and the only way to determine that is discovery.

Now that discovery, I was just commenting to my partner, Mr. Kudon, that I almost wish we hadn't dismissed it, so we could go ahead and take the discovery and prove it [49] to be true, and that would take care of this motion, but what we've done, we've done, and that will have to wait another day.

Now, Mr. Favretto makes a lot of the fact—and I, to be candid, don't understand the concept—that somehow John Dashtara is supposed to know what happens in Philadelphia or Boston or San Francisco with respect to this. The plain and simple fact of the matter is that John Dashtara comes in, he says, client to lawyer, "I have a problem. Here's what I understand the facts to be, here's what I understand my problem to be. What do I do?" The lawyer makes an investigation that seems to say what it says, and the results seem to be that Mr. Dashtara is correct, and then we have his deposition taken, and he says, "And what investigation did you make, Dashtara?" "I didn't do anything. I did what my lawyers told me to do."

The law firm made the investigation. He has every reason to believe what I tell him are the results of that investigation, and indeed, if that be so, then he has every reason to verify the complaint and go forward.

That is not only not uncommon, at least in my experience in dealing with clients in litigation, it's common. They come in and they say, "I have a problem. Here's what I think it is," and the lawyers investigate, and if the lawyers' investigation indicates that they have a cause of action, [50] that's when the suit gets filed. It doesn't get filed because the plaintiff says, "I've got this great case." It's because the lawyer makes an investigation and tells the plaintiff, "You have a case," and that's when the suit gets filed.

So this whole business about John Dashtara, and whether he should have made an independent investigation one way or another, over and above what we did, it seems to me, misses the point. The point is, was an investigation done, no matter who did it, and if it was done, was it reasonable under the circumstances, and in the context of this case, is it so, and I submit that it is so.

I didn't completely understand Mr. Favretto's comments that somehow I was remiss because I signed it and didn't make the telephone calls. I don't know what that means. I'm a partner in a law firm. It would be unusual for me in my position in that law firm to make the basic investigatory phone calls myself. Frankly, if I were going to do that, I'd have to fire a lot of people, because I wouldn't need them. That's why I hire people, to do that sort of thing. I got the impression Mr. Favretto was troubled that I didn't make the calls personally, and I signed the paper. It seems to me that I'm entitled to rely on the results of the investigation, whether I do it myself, or whether my colleagues do it, and I did just that, and I [51] think I'm entitled to do that.

The bottom line is, it seems to me, that Mr. Favretto toward the end of his argument said, you know, deterrence is a substantial function of Rule 11. That's exactly what that Rule is. It's deterrence. The question is, deterrence by whom and for what? It's designed to be deterrence by the Court for frivolous lawsuits, frivolous

pleadings, based on no investigation, no reasonable effort to find out if it's true, a scatter-gun approach, where you sue everybody in sight. That's the abuse it's designed to protect, to prevent.

It's not designed, anywhere that we can find, to protect substantial antitrust corporate defendants from having to defend antitrust class actions by saying, "We have all the information, and that action is frivolous," because if he's right, the deterrent effect it has is not on the filing of frivolous pleadings. The deterrent effect that it has, if Mr. Favretto's theory is correct, is on the filing of any antitrust class actions.

How are you ever going to do enough to figure out to a certainty, to any reasonable probability, that effect on individual class members, assuming a large class? the effect on disparate markets, assuming numerous markets across the country? The deterrent effect that Mr. Favretto's argument goes to isn't deterrent. It's not deterrence. It's [52] chilling. The effect of Mr. Favretto's pleading and the effect of a ruling by this Court in Mr. Favretto's favor and the favor of his clients on Rule 11 isn't to deter frivolous pleadings, it's to chill the next antitrust plaintiff's lawyer who makes an investigation, thinks he has a claim, but can't prove it because they've got all the documents.

What's going to happen, if that indeed be the purpose of this Rule, is that plaintiffs' lawyers aren't going to want to file any of these things, because it's not comfortable, Your Honor, for me to be standing here. I've never had a Rule 11 motion filed against me. It's not comfortable for me to be standing here having to justify why I did and when I did it. I suspect it would be as uncomfortable for the next plaintiff's lawyer who came along, and I'll suggest that the effect of that kind of a ruling is simply to chill plaintiffs' antitrust cases, and I'll suggest that that may not be unintentional, because apparently, if you look at the antitrust cases, it comes up all the time. It is not, apparently, from our reading, all

that unusual or unique to find the corporate defendant file a Rule 11 motion to try and, in effect, frighten the antitrust plaintiff and his lawyer from vigorous prosecution of the suit.

Whether this case be dismissed or whether it wasn't, that isn't what happened here. We're not frightened of the [53] Rule 11 motion. It did not result in that dismissal, but as a practical matter, that is the effect of such a ruling.

For all of those reasons, both for policy reasons and for reasons of practicality, and that is, that we did what could reasonably be done in the circumstance, would lead us to ask Your Honor to deny his motion.

THE COURT: All right. While you're still on your feet, today was the cut-off day for discovery in the antitrust case. As you know, we had an issue which I've resolved as far as this Court is concerned, and we want to conclude those depositions.

MR. COOTER: Yes, sir. I mean—

THE COURT: I want to give you a trial date.

MR. COOTER: All right.

THE COURT: How much time do you need to conclude your depositions?

MR. COOTER: I haven't been as involved in the discovery process in that case as others of my colleagues. My understanding is that there are substantial document—there are a substantial number of documents we still don't have.

THE COURT: You had approximately two weeks to go when your colleague, Mr. Kudon, came into court on the matters that he presented to me approximately two weeks ago. I'm not disposed to give much more than two weeks.

* * * *

[66] THE COURT: Very good.

MR. COOTER: Thank you, Your Honor.

THE COURT: Thank you.

Now, you may—I hope you can be brief.

MR. FAVRETTO: Your Honor, I will be brief in response.

Mr. Cooter, as is his custom, I'm afraid, has meandered through his argument, making reference to a lot of things which are not in the record before the Court.

Your Honor is correct. The sole issue on a Rule 11 motion pending in the class action case is whether or not a reasonable investigation was conducted by the plaintiff before they filed their complaint.

That record, which is contained—which is reflected in the affidavits of the lawyers representing the plaintiff, establishes that no investigation at all, none, was conducted with respect to one of the defendants they named in the case, Hickey-Freeman Company. No investigation at all.

The President of the plaintiff, Mr. Dashtara, testified in his deposition, which has been filed with the Court, taken on February 29th of this year, that he performed no investigation himself, and knew nothing about the complaint except what his lawyers told him.

[67] Now, we have Mr. Cooter telling us that this all started by Mr. Dashtara's hunch, I take it, that he was the target of an antitrust violation, another antitrust violation on the part of the defendants.

Thirdly, there was no investigation whatever, Your Honor, of price fixing, there was no investigation of boycott, and there was no investigation of territorial division. The only inquiry they made, as flimsy and as meager as it was, involved questions related to whether or not retailers in four cities sold Hart Schaffner & Marx suits. That was the extent of their investigation.

That is important, Your Honor. It is extremely important, because when they responded to our 12(b)(6) motion on February 27th, 1984, they admitted that an exclusive selling arrangement by itself would be perfectly legal, that it would only be unlawful if it was accompanied by or in furtherance of price fixing, boycotts, or other anti-competitive activities or violations, and I

would refer the Court to—I believe I am correct, Page 12, Footnote 3, I believe, in their response to our motion to dismiss in this case. So by their own admission, an exclusive retailing policy, even if it exists—and it does not—would not by itself violate the law, absent its being tied in to some other antitrust violation, and they never made any inquiry on those substantive violations.

[68] Also, Your Honor, there was no adequate examination as to the class allegations. We have cited a case in our Rule 11 papers, which indicates—which holds that you have to justify or satisfy yourself that your class allegations are adequately and soundly based upon a reasonable inquiry. They did not do that. They called four cities in the Northeast. Giving that investigation whatever presumption you want—and we don't think it's entitled to any—that did not acquit their responsibilities to investigate the class action allegations.

This case that is the subject of the Rule 11 motion has nothing to do with the Robinson-Patman Act allegations, or the price discrimination allegations filed against Intercontinental. The class action case against Hartmarx, Hickey-Freeman, and Hart Schaffner & Marx involves totally separate violations of the law, and has nothing whatever to do with Robinson-Patman Act violation, which is charged against us in the other case.

We filed a Rule 11 motion in the class action case involving the resale price maintenance and exclusive retailer allegations which are now before Your Honor.

Mr. Cooter had a sheaf of Xeroxed cases before him, and he went through them for Your Honor, and he relied principally on the Poller versus CBS case, I believe. That case is an antitrust case that deals with the standards to [69] apply when summary judgment on the merits is the subject of the motion. We are not in that posture here, Your Honor. The only question is, did they perform the reasonble investigation which is required of them under Rule 11?

None of the cases cited by Mr. Cooter, based on his description, had to do with Rule 11 or with that issue.

None of the cases, in any event, occurred after the 1983 amendments to Rule 11, which tightened up the responsibility of a lawyer under that section to conduct the reasonable inquiry.

The standard is simply reasonable under the circumstances. We ask the Court to look at what they said they did in their affidavits, and to look at what they charged us with, and to make that determination.

Mr. Cooter further said that the exclusive retailer policy which they charged us with exists. Well, it does not exist. By his own admission, it does not exist.

We filed affidavits to that effect. He never challenged the affidavits. We have an affidavit from his own lawyer, Mr. Hantzes, which indicates that he conducted an investigation after we filed our Rule 11 motion, and found that it did not exist. So whatever they are now certain of as existing, by their own admission it is not what they charged us with in the complaint. They knew that immediately upon [70] our filing the Rule 11 motion. They did not withdraw their complaint at that time.

Mr. Cooter also stated that the affidavit—the defendant's 12(b)(6) motion did not contest the factual accuracy of the allegations in this complaint. That is untrue. Our 12(b)(6) motion had the affidavits of executives from Hart Schaffner & Marx and Hickey-Freeman attached to it, and those affidavits quite clearly lay out the facts of our retailing policy, and those affidavits further make it quite clear that we're talking about retailers not outlets, as Mr. Cooter would lead this Court to believe, and I refer the Court to Paragraph 6 of the affidavit of Mr. Hickey and the affidavit of Mr. Davis, filed both with our motion to dismiss and with our Rule 11 motion.

In substance, Your Honor, the allegations were wrong, factually wrong. They are still wrong. Their own subsequent investigation demonstrates that they were wrong.

They conducted no inquiry at all about Hickey-Freeman, yet they sued us, and they sued Hickey-Freeman. They conducted no inquiry about price fixing.

They conducted no inquiry about boycotts. Yet they sued us for that.

They conducted a pitifully inadequate inquiry, and I would say no inquiry at all sufficient to base their class allegations on.

For all of those independent reasons, we believe that [70-A] Rule 11 has been violated in the extreme, and that we are entitled to sanctions. Thank you, Your Honor.

THE COURT: Thank you. Case submitted.

(At 3:58 p.m., the hearing was concluded.)

(Certificate of Reporter Omitted in Printing)

SUPREME COURT OF THE UNITED STATES

No. 98-275

COOTER & GELL,
Petitioner

v.

HARTMARX CORPORATION, *et al.*

ORDER ALLOWING CERTIORARI

Filed October 16, 1989

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted limited to Questions 1, 3 and 6 presented by the petition.

October 16, 1989

Supreme Court, U.S.
FILED
NOV 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-275

IN THE

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OCTOBER TERM, 1989

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HARTMARX CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S BRIEF

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QUESTIONS PRESENTED*

1. Whether authority exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i).

2. Whether review of Rule 11 sanctions under an "abuse of discretion" standard is appropriate.

3. Whether a Court of Appeals can automatically impose Rule 11 sanctions for an appeal upon affirmance of a Rule 11 award.

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* The Court's grant of certiorari on October 16, 1989 limited review to these three questions.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption to the Petition, Danik, Inc. was a Plaintiff in the District Court. The Court of Appeals dismissed Danik's appeal for failure to prosecute. Danik is now bankrupt.

Respondents include Hart, Schaffner & Marx Corporation and Hickey-Freeman Co., Inc., wholly-owned corporate subsidiaries of Hartmarx Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-275

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Cert. P. App. 1a-17a) is reported at 875 F.2d 890 (D.C. Cir. 1989). The ruling of the United States District Court for the District of Columbia granting sanctions (Cert. P. App. 18a-31a) is reported at 120 F.R.D. 439 (D.D.C. 1988).

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Certiorari was granted on October 16, 1989.

STATUTORY PROVISIONS INVOLVED

Respondent Hartmarx Corp., et al., filed for sanctions against Petitioner Cooter & Gell pursuant to Fed. R. Civ. P. 11 which provides in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading . . .; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the expenses reasonably incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee.

Prior to a ruling on that Motion, Danik, Inc. voluntarily dismissed its complaint pursuant to Fed. R. Civ. P. 41(a)(1)(i) which provides:

> Subject to the provisions of Rule 23(e) . . . an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . .

Petitioner contends that absent a finding of frivolousness under Fed. R. App. P. 38, sanctions may not be imposed for Petitioner's appeal. Fed. R. App. P. 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

This case arises from litigation between a discount men's clothing company, Danik, Inc. (hereinafter "Danik"), against Hartmarx Corporation, a leading manufacturer of men's suits and three of its subsidiaries (two of which, Hart, Schaffner & Marx Corporation, and Hickey-Freeman Co., Inc. are Respondents herein).[1] Litigation between Danik and Hartmarx began in 1983 with the filing of a lawsuit by a Hartmarx subsidiary, Intercontinental Apparel, Inc., against Danik for money owed on a contract for clothing supplied to Danik. Danik filed a counterclaim alleging Robinson-Patman Act violations by Intercontinental. Two other suits, including the underlying action here, were filed by Danik against Hartmarx and its subsidiaries, alleging various violations of federal antitrust law.

Petitioner, the District of Columbia law firm of Cooter & Gell, represented Danik in each suit. As a result of its filing a class action complaint against the Respondents on November 29, 1983, Respondents filed a motion to dismiss and simultaneously sought sanctions under Rule 11 against both Petitioner and Danik. Petitioner subsequently filed a notice of dismissal of the complaint on April 30, 1984, and thereafter sought and obtained the District Court's approval to dispense with notice to the identified class on July 31, 1984.[2]

The owners of Danik had been in the men's clothing business in the Washington area since 1969. (J.A. 28).

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[1] For the Court's convenience, Hartmarx, the parent company, and its two subsidiaries who are Respondents herein will be referred to jointly as Respondents, since no argument is made on behalf of any Respondent individually. The individual Respondents will be identified by name when their identities are relevant to the facts or legal arguments presented herein.

[2] Danik requested on May 9, 1984 that the District Court allow Danik to dispense with notice of the dismissal to the class that had been identified in the complaint. Respondents did not oppose this motion.

At the time Intercontinental filed its suit, Danik operated five stores at different locations. (J.A. 29). John Dashtara and Dar Dash, the owners of Danik, complained to Petitioner that Danik had been compelled to pay higher prices for suits purchased from Intercontinental than its competitors had paid for the same suits, and believed that Intercontinental was discriminating against Danik in favor of direct competitors. (J.A. 55-57). They also complained that, although they had been able to purchase goods from Intercontinental, for years they had been unable to purchase suits from Hartmarx's better lines manufactured by Hart, Schaffner & Marx and Hickey-Freeman, two of the Respondents. (J.A. 57).

Based on these complaints, Petitioner conducted an investigation of the price discrimination claims in the *Intercontinental* case and concluded, on the basis of an examination of the prices charged to Danik's principal competitor, Syms, that it was apparent that Syms was able to purchase from Intercontinental the same clothes which Danik purchased, but Syms was paying a much lower price. (J.A. 55-57). The reasonableness of Petitioner's investigation in the *Intercontinental* case and the existence of a factual basis for the Robinson-Patman counterclaim filed on Danik's behalf were never doubted by the District Court.[3]

During discovery in the *Intercontinental* case, Petitioner took a deposition at Intercontinental's assembly plant in Buffalo, New York, and examined the invoices of Syms, Danik's principal competitor. Although prior to this deposition Respondents' counsel denied that Syms had received any discounts (J.A. 55-56), Petitioner discovered that Syms in fact received approximately a 20% across the board discount from the prices charged Danik.

[3] The *Intercontinental* case was tried in February 1985, one and one-half years after the voluntary dismissal in the *Hartmarx* case. Although Danik ultimately lost its Robinson-Patman Act counterclaim in *Intercontinental*, it did so only after a jury trial in which liability was vigorously tested on both sides.

This confirmed Danik's allegations of price discrimination and alerted Petitioner to be wary of the representations made by Respondents' counsel. (J.A. 56).[4]

In addition to complaining to Petitioner about the price discrimination it perceived in favor of Syms, John Dashtara and Dar Dash also told Petitioner that, based upon their experience in the retail clothing business and their knowledge of the national market in men's clothing, they believed that Respondents were engaged in exclusive dealing practices which were designed to artificially inflate prices in up-scale men's suits. They informed Petitioner that Danik had been trying unsuccessfully for years to purchase more up-scale suits from Respondents and that they believed that the prices for these suits were inflated as a result of the deliberate marketing practices of Respondents. (J.A. 57).

The deposition in Buffalo not only confirmed price discrimination in favor of Syms in Washington, it also led to a discovery that there apparently was price discrimination in every city (at least seven or eight which Petitioner was able to discover) in which Syms did business. (J.A. 56). Because this discovery also confirmed allegations made by Danik, it led Petitioner to take the owners' additional claims of price-fixing and exclusive dealing more seriously. (J.A. 56-57).[5]

Once Petitioner decided that the allegations of price-fixing and exclusive dealing warranted serious considera-

[4] Petitioner described at some length to the District Court its reaction to discovering that the actual prices charged Syms by Intercontinental were discounted, despite counsel's assurances that they were not. (J.A. 56). Counsel for Respondent contended that all he ever stated was that Intercontinental's practices did not constitute an antitrust violation.

[5] The principal owner of Danik, John Dashtara, told Petitioner that it was his understanding that Respondents engaged in a nationwide practice of limiting sales of certain lines of suits to exclusive dealers and that the practice resulted in artificially high prices. (J.A. 57).

tion, Dale A. Cooter, lead counsel for Danik, directed others in the firm to conduct a telephone survey to determine whether these allegations could be corroborated. Petitioner filed four affidavits in response to Respondents' Rule 11 motion which describe its investigative efforts. (J.A. 16-27).

The telephone survey itself was supervised by Joseph Cahill, one of the partners in Cooter & Gell. Mr. Cahill's affidavit states that, based on information received from Danik principals concerning not only Washington, but also other major metropolitan areas, he directed a secretary, Faye Reid, to telephone retailers in Washington, D.C., Philadelphia, Pennsylvania, and New York, New York, to determine whether there was more than one retailer of Hart, Schaffner & Marx suits in each city. (J.A. 22-23). As set forth in her affidavit, Ms. Reid made numerous telephone calls, and found that only one retailer in each city carried the suits. (J.A. 16-17). Cahill also telephoned a number of retailers in the Baltimore area, who indicated that only one store carried these suits. (J.A. at 23).

Dale Cooter filed the third affidavit and indicated that in filing the complaint, his firm was relying on information provided by Danik with respect to Respondents' local and national marketing practices, corroborated by the telephone survey. (J.A. 24-27). Just as the Buffalo deposition had corroborated Danik's claims of price discrimination, the calls made to major East-coast cities corroborated Danik's allegations that Respondents were engaged in a standard, nationwide marketing practice. At this point, Petitioner was prepared to trust Danik's representations concerning inflated prices, in view of Danik's experience in the industry and its knowledge of general pricing practices in the industry. (J.A. 56-58).[6]

[6] Danik suggested to Petitioner that there were no real differences between suits bearing a number of different labels—*i.e.*, Hart, Schaffner & Marx v. Hickey-Freeman—which Respondents manufactured, and that the national sales policies were substantially the same for both Hart, Schaffner & Marx and Hickey-Freeman. Danik explained also that it had been unable to purchase up-scale suits from either of the Hartmarx subsidiaries and that it viewed the prices of suits manufactured by both as artificially high.

After making this investigation, Petitioner consulted a former Chief of Litigation at the Federal Trade Commission, who suggested that Petitioner had two substantial class action complaints based on the information provided by Danik and the investigation that had corroborated that information. (J.A. 58-59). Before filing either suit, however, Petitioner drafted complaints and contacted both the general counsel for Hartmarx in Chicago and outside counsel who represented Intercontinental as well as Respondents. (J.A. 59-60). Petitioner first telephoned the general counsel and outlined the antitrust violations which it believed Respondents were committing. Thereafter, Petitioner provided copies of both draft complaints by mail to the general counsel. At or about the time these copies were provided, Petitioner gave copies to the outside counsel and indicated that it would give them whatever time they needed to review the complaints. (J.A. 59-60).

After Petitioner afforded both the general counsel and outside counsel a week or ten days, plus another week's extension, to review the complaints, Respondents' counsel indicated that they had no intention of discussing the proposed complaints with Petitioner. As affidavits of Mr. Cooter and one of Respondents' outside counsel, Jeffrey Gordon, both indicate, at no time was a suggestion made that the two proposed class action complaints were procedural devices to promote a settlement in the *Intercontinental* case. (J.A. 26-27; Attachment to District Court Docket Entry 12 (Gordon Affidavit)). Indeed, Mr. Gordon and Mr. Cooter both recall that Mr. Cooter expressed his belief that the threatened liability of Intercontinental and other defendants in the class ac-

tions far exceeded the amount owed by Danik on Intercontinental's contract claim. (J.A. 26-27; Attachment to District Court Docket Entry 12).

At no point did any Hartmarx representative or counsel suggest that the price-fixing-exclusive dealing allegation at the core of the class action complaint was based on inaccurate information. Only after Petitioner learned that neither the Hartmarx general counsel nor the outside counsel had any interest in discussing the complaint was it filed in the District Court.[7]

The complaint alleged violations of the Sherman Antitrust Act, 15 U.S.C. § 1 and the Clayton Antitrust Act, 15 U.S.C. § 12. After the complaint was filed, Respondents filed a motion to dismiss accompanied by affidavits of officers of Respondents. These affidavits denied exclusive dealing arrangements and purported to identify how many retailers in major metropolitan areas with whom these subsidiaries dealt. (*See* Attachments to District Court Docket Entry 12). Thereafter, Nicholas Hantzes, a Cooter & Gell associate, did further investigation and discovered that in telephone books for major metropolitan areas, retailers were listed as "exclusive dealers" for both subsidiaries. (J.A. 18-21). He also discovered that, to the extent other retailers advertised that they sold Respondents' merchandise, they only carried specialty sizes of those items—*i.e.*, big or tall, or short. The pattern which became apparent to him was that, despite Respondents' affidavits which claimed numerous retailers in each city, the metropolitan areas contained only one retailer who sold a full selection of Respondents' prod-

[7] Mr. Cooter stated in his argument to the District Court that, based on the erroneous information obtained from Respondents' counsel in the *Intercontinental* case, he was not sure that he would have believed a denial by Respondents of the allegations of the complaint. (J.A. 61). At no time however, did Mr. Cooter or any other Cooter & Gell attorney suggest that they would have declined to investigate any information that Respondents chose to provide.

ucts. (J.A. 20-21). He also learned that in the Western States, the suits could only be purchased from retailers that were Hartmarx subsidiaries. (J.A. 20). He concluded that a strong case remained that the Respondents had established a network of exclusive dealerships as originally alleged in the complaint. (J.A. 20-21).

In February 1984, following the filing of the Rule 11 motion, Respondents took the deposition of John Dashtara, Danik's president.[8] Dashtara arrived in the United States shortly before he entered the clothing business in 1969, and he had some difficulty in reading English. He explained that the complaint which he verified had been read to him by his sister-in-law. (J.A. 31). In response to a series of questions put to him by Respondents' counsel, Dashtara indicated that he had relied upon the advice of counsel in verifying the complaint and that he had done no independent "investigation" of the factual allegations made in the complaint. (J.A. 33-35). At no point was Dashtara asked about his general knowledge of the men's clothing business or of his beliefs concerning the degree to which suits manufactured by Respondents were sold at inflated prices.

During the deposition, Mr. Cooter, on behalf of Petitioner, stated as follows:

> . . . Mr. Favretto, in your moving papers somewhere pursuant to Rule 11 you indicated that you would be happy to depose Mr. Dashtara or myself of [sic] other representative of my law firm with respect to what independent investigation we made prior to the filing of the Complaint to determine whether or not we would file it in a good faith belief that it was true. *I will be happy to submit myself or* [sic] *other member of my law firm for deposition for*

[8] Petitioner filed a motion for protective order to prevent the taking of this deposition on the grounds that it was premature. (District Court Docket Entry 9.) This motion was denied. (Docket Entry 17.)

> *that limited purpose without in any fashion waiving any attorney-client privilege or without in any fashion suggesting that I am a proper witness in this case. If you want to do that, I will be happy to give you all the information you want.* Obviously, Mr. Dashtara, as you know from the response to Rule 11, didn't make the investigation. We did, and now its crystalline.

(J.A. 34-35). During the deposition, Petitioner made every effort to assure that Danik's attorney-client privilege was neither violated nor inadvertently waived. In order to assure Respondents' counsel that they could have full information concerning all investigative efforts made prior to filing the complaint, Mr. Cooter stated as follows:

> I have offered to make the lawyers available who have firsthand knowledge with respect to the inquiry made. Just because [Dashtara's] knowledge is derivative from the law firm does not mean that he is required to disclose privileged conversations between himself and counsel, nor will I allow him to. I instruct him not to answer. I would be happy, pursuant to your papers, to give you people who can answer your inquiry.

(J.A. 37).[9]

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[9] Some of the questions put by Respondents' counsel were ambiguous at best and subject to misinterpretation at worst. For example, counsel called this sentence from paragraph 26 of the complaint to Dashtara's attention: "Upon information and belief, either as a condition of the exclusive retailer status or by agreement with the retailer, Hart, Schaffner and Marx and Hickey-Freeman men's suits are sold by the retailer at the defendants' suggested retail price or at an artificially high price." Dashtara was then asked whether he had an independent reason to believe that the allegation was true, other than what Petitioner had told him. (J.A. 38). The entire thrust of the deposition was to the effect that Petitioner discussed its investigation with Dashtara and that he verified the complaint, which was phrased in legal terms, on the basis of the discussion. Dashtara was never asked the simple question whether

Like many lawyers and firms who have been confronted with Rule 11 motions, Petitioner found itself walking a tightrope both in the deposition and thereafter in providing affidavits and making arguments to the District Court. Had Petitioner identified communications by Danik principals upon which Petitioner relied, Danik might have suffered the loss of its attorney-client privilege. Yet, Petitioner could not adequately respond to the Rule 11 motion without relying to some extent on the information conveyed to it by its clients, who had more than a decade of expertise in the men's clothing business and whose information had been corroborated in the *Intercontinental* case. Since the *Intercontinental* case remained pending, any waiver of the privilege or dispute between Danik and Petitioner as to what was said prior to the filing of the complaint might have prejudiced that case.

In April 1984, Petitioner decided to dismiss the class action suit because it lacked the resources to try the *Intercontinental* case while simultaneously pursuing the class action. (J.A. 63-65). Mr. Cooter explained to the District Court that he was a partner in a 12-lawyer firm engaged in litigation against Respondents' law firm, Mayer, Brown & Platt, a major Chicago and national firm. Mr. Cooter decided that he could not pursue the class action and at the same time adhere to the tight discovery schedule imposed by the District Court in the *Intercontinental* case. (J.A. 64-65).

Petitioner therefore filed its notice of dismissal pursuant to Rule 41(a)(1)(i) on April 30, 1984. It was

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he had the belief, prior to the filing of the complaint, that Respondents produced up-scale suits which were sold at artificially high prices and that they sought to encourage this result by restricting the dealers with whom they dealt. Moreover, it was imperative that Petitioner object to questions that called for Dashtara to reveal what he had said to counsel, lest the attorney-client privilege be inadvertently waived.

aware, however, that Rule 41 provided that any dismissal in a class action suit is subject to Rule 23(e), and therefore filed a motion on May 9, 1984 to dispense with notice of the dismissal to the identified class. Between the time that the dismissal notice was filed and July 31, 1984, when the District Court granted the motion to dispense with notice, the District Court heard argument on the Rule 11 motion and purported to take the matter under advisement. At the time of the Rule 11 argument, the case was not finally terminated because the May 9 motion to dispense with notice was still pending. On July 31, 1984, the Court granted the motion and the dismissal notice was fully effective.[10]

No action was taken with respect to the Rule 11 motion for nearly four years after Respondents filed their motion, and approximately three and one-half years following the grant of the motion to dispense with notice to the class. In late 1987, Dale Cooter represented American Security Bank in *Kuwait Airways Corp. v. First American Bank, N.A., et al.*, Civ. No. 86-2542, another lawsuit pending before the same District Court (the Honorable Oliver Gasch). This lawsuit was completely unrelated to the Danik litigation. It was a vigorously contested trial that lasted several weeks. Two weeks after the conclusion of the *Kuwait* trial, on December 2, 1987, the District Court, *sua sponte*, entered an order which stated that Respondents' long dormant Rule 11 motion was "ripe for decision" and directed Respondents to furnish the court with a statement of fees and costs. The District Court denied Petitioner a further hearing on the Rule 11 motion, and failed to identify any circumstance that made the motion "ripe." On December 23, 1987, Respondents filed their statement, seeking almost $62,000 in sanctions. The District Court determined that Respondents' request was excessive and ultimately imposed sanctions of $21,452.52 against Petitioner and $10,701.26 against Danik.[11] Both Petitioner and Danik appealed; Danik's appeal was dismissed for failure to prosecute following a bankruptcy, and the Court of Appeals affirmed the sanction against Petitioner. This Court granted certiorari to review the three questions set forth, *supra*.

[10] Had the District Court granted the Rule 11 motion prior to ruling on the Rule 23(e) motion, the argument could be made that the sanction was imposed prior to the effective date of the Rule 41 dismissal. It is clear, however, in this case that both parties and both lower courts concluded that the dismissal was plainly effective prior to the award of sanctions.

The District Court justified its ruling by finding that Petitioner had not done an independent investigation of Hickey-Freeman and had confined its investigation to Hart, Schaffner & Marx; that Petitioner had not made a sufficient "systematic inquiry" among retailers; and that Petitioner had not sufficiently examined the anti-competitive effects of Respondents' practices. The court declined to treat the failure of Respondents' counsel to identify their concern about the complaint at the time they were provided a draft as a bar to the recovery of sanctions.

At no point did the District Court or Respondents challenge any of the representations made by Petitioner with respect to the investigation that had been made. Thus, the District Court imposed sanctions in a case in which the following facts were undisputedly true and implicitly regarded as irrelevant:

> 1. Petitioner had been informed about industry practice by its clients, who had substantial experience in the men's clothing business.

[11] This Court has recently heard argument in *Pavelic & Leflore v. Marvel Entertainment Group*, 854 F.2d 1452, *cert. granted*, —— U.S. ——, 109 S.Ct. 1116 (1989), in which, as here, sanctions were imposed on the *law firm*, rather than on the individual attorney. Should this Court find that sanctions may only be imposed on the individual attorney and not on the firm, Petitioner respectfully submits that this case be reversed on grounds of plain error.

2. The allegations made by the clients with respect to price discrimination in the *Intercontinental* suit were corroborated by an independent investigation, and these allegations involved a number of cities outside the Washington area.

3. Prior to filing a complaint in the class action suit, Petitioner made telephone calls to several major cities and received information that corroborated the information they had received from their clients. The information was not inconsistent with a nationwide practice on the part of Respondents.

4. Prior to filing the complaint, Petitioner provided copies to Hartmarx's general counsel and to Respondent's outside counsel and offered to give them as much time as was required for them to analyze the complaint. Petitioner provided an extension of time when asked. No suggestion was made by Respondents that the allegations concerning exclusive dealing, which was the key to inflating prices according to the complaint, were incorrect.

5. Respondents were fully aware that when representations had been made by Respondents concerning the prices charged to Danik's competitors in the Intercontinental case, Petitioner carefully and faithfully arranged to examine the relevant documents to ascertain whether the representations were correct. Although Petitioner concluded that Respondents' outside counsel had given them information that did not appear to be consistent with what Petitioner learned in discovery in the *Intercontinental* case, and expressed reservations about believing additional representations, at no time did Petitioner ever express any reluctance to investigate fully any information that might have suggested that its factual theory or the information provided by its clients was incorrect.

6. Petitioner had offered to make available for depositions any of its lawyers to explain their reliance on Danik's information and the ways in which they sought to corroborate it.[12]

Cooter & Gell appealed the imposition of sanctions. The appeal was based on the claim that the District Court lost jurisdiction over the motion when the case was voluntarily dismissed. Cooter & Gell further argued that even if the court retained jurisdiction, the sanctions were improperly imposed because the prefiling inquiry conducted was objectively reasonable. Cooter & Gell also claimed the award was excessive. The Court of Appeals rejected Cooter & Gell's arguments, upheld the District Court decision, and additionally ordered Cooter & Gell to pay Hartmarx's attorney's fees for the appeal. The Court of Appeals affirmed the District Court without relying on the District Court's finding that Petitioner did not adequately investigate the anticompetitive effects of the behavior which it alleged in the complaint.[13]

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[12] Neither Respondents nor the District Court expressed any interest in such explanations.

[13] At the time the class action suit was filed alleging an intracorporate conspiracy implemented in part by exclusive dealing arrangements, the complaint stated a sound antitrust claim under the law as it stood at the time. The incapacity of a parent and its wholly-owned subsidiary to conspire in violation of Sec. 1 of the Sherman Act was only later settled by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Obviously, changes in the law between the District Court finally imposed sanctions, filed, and 1988, when the District Court finally imposed sanctions, would have suggested that in 1988 a plaintiff would not have filed the same complaint which Danik filed five years earlier. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Northwest Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). But, the test for Rule 11 is whether the complaint was reasonable in fact and law when it was filed. The authorities make it clear that Danik had a firmly grounded complaint. As set forth above, Danik also relied upon an antitrust expert to provide counsel before the complaint was filed.

SUMMARY OF THE ARGUMENT

Petitioner submits that a voluntary dismissal under Rule 41(a)(1)(i) ends a case and removes authority of a district court to impose sanctions under Rule 11 or other rules of civil procedure. This argument is supported by the language of Rule 41, a comparison of the language of Rules 41 and 11, the history of Rule 41, and the policies that support voluntary dismissal under Rule 41(a)(1).

The text of Rule 41(a)(1)(i) plainly indicates that a plaintiff has an option of dismissing, without prejudice, prior to the time a defendant has either answered or moved for summary judgment. A comparison of Rules 41(a) and 41(b) demonstrates that the district court's authority to impose conditions upon dismissal is confined to dismissals falling within subsection (b) and is not extended to voluntary dismissals prior to answer or a summary judgment motion. If Rule 11 permits the district court to impose costs and fees on a plaintiff who dismisses under Rule 41(a)(1)(i), there is no longer any real difference between that rule and Rule 41(b), and the historic role of Rule 41(a)(1)(i)—to provide a plaintiff with an opportunity early in a case to abandon it without limitation—will be destroyed while Rule 41(a)(1) will become redundant.

Moreover, if the district court has the power to impose fees and costs following a dismissal under Rule 41(a)(1)(i), there is no longer any right to a dismissal without prejudice. The imposition of fees and costs often, if not always, involves some look at the merits of the complaint, and it is linguistically impossible to treat a dismissal that is accompanied by sanctions as being without prejudice.

Also, if the district court retains power under Rule 11 to impose sanctions following a voluntary dismissal, presumably the scope of the sanctions would be as broad in

the case of a Rule 41(a)(1)(i) dismissal as in any other case. Thus, the district court would have the power to order a dismissal with prejudice, even though Rule 41(a)(1)(i) guarantees a right to a dismissal without prejudice. This possibility demonstrates that Rule 11 must bow to Rule 41(a)(1)(i).

The history of Rule 41(a) bolsters Petitioner's analysis of the plain language of the rule. This Court has chosen over the years to retain a plaintiff's right to unlimited dismissal prior to the filing of designated pleadings, and it has clearly provided that a plaintiff may dismiss without limitation unless and until a defendant files an answer or moves for summary judgment.

The Court has wisely left Rule 41(a)(1)(i) available to plaintiffs, and the utility of that rule and the goals of the Federal Rules of Civil Procedure would be undermined by a holding that a district court may impose sanctions upon lawyers and their clients even after a complaint is dismissed under Rule 41(a)(1)(i). As this case demonstrates, post-dismissal Rule 11 sanctions encourage satellite litigation, threaten attorney-client relationships, engender extensive delays in final termination of cases, and produce unnecessary appeals. The advantage of Rule 41(a)(1)(i) dismissals is that they put a quick, clean end to litigation before it has gone far. To permit a district court to impose sanctions after dismissal, either *sua sponte* or at the request of a party, will deter reliance on the voluntary dismissal rule, encourage defendants to hold back information until after a complaint is filed (as the Respondents did in this case), and to use Rule 11 as a continual threat to chill plaintiffs from pursuing legal remedies.

There is no need for Rule 11 sanctions following a Rule 41(a)(1)(i) dismissal, as the instant case so clearly demonstrates. Had Respondents reviewed Danik's complaint and pointed out any alleged major errors in it, Danik would have been able to conduct further investiga-

tion and Respondents would never have had occasion to file a Rule 11 motion. This Court is most likely to discourage wasteful litigation and unhelpful posturing by litigants if it encourages exchanges of information rather than Rule 11 motions, which is exactly the result that will be likely if the Court accepts Petitioner's argument that Rule 11 sanctions may not be imposed following a dismissal under Rule 41(a)(1)(i).

Assuming, however, that Rule 11 sanctions may be imposed following a Rule 41(a)(1)(i) dismissal, Petitioner asks that this Court differentiate the various tasks that a district court performs when it resolves a Rule 11 motion in deciding the proper scope of appellate review. For reasons that will be developed more fully, *infra*, Petitioner submits that the clearly erroneous standard of review is appropriate when a district court engages in traditional fact-finding (assuming that the fact-finding follows a hearing or a proceeding in which facts may fairly be determined). The abuse of discretion standard, such as the one utilized below by the Court of Appeals, is appropriate when an appellate court examines the sanctions actually imposed following a correct ruling that Rule 11 has been violated.

It is important, however, that these aspects of a Rule 11 motion be distinguished from three others: the application of the facts to the standard set forth in Rule 11, the determination of the proper procedures to be employed in a Rule 11 proceeding, and the definition of a defendant's duty to mitigate and the scope of that duty. These are all questions of law and should be subject to *de novo* review in the courts of appeal.

The first issue, whether the facts found by the district court constitute a Rule 11 violation, is a determination as to what is unreasonable as a matter of law. When a trial court decides that under the circumstances a lawyer or litigant who filed a complaint acted unreasonably, the

court is declaring for the entire bar that the identified behavior is legally deficient and cannot be deemed reasonable. Such a declaration is an announcement that reasonable minds will not be permitted to differ on the point, and in the end it constitutes a rule of behavior that is binding on the lawyer or litigant who is sanctioned and all others who follow in the district courts of the United States. The importance of such an announcement of a legal principle requires the most careful, *de novo* review lest there be inconsistent results and confusion that will threaten the concept of equal justice under law.

Similarly, the question whether certain procedures are adequate or tolerable in a Rule 11 procedure is a question of law, as to which no deference is required by an appellate court. In the instant case, for example, Petitioner contends that nearly a four year delay between its notice of voluntary dismissal and the District Court's Rule 11 sanction is unreasonable and totally indefensible in view of the deterrent purpose of Rule 11. Moreover, such delays threaten to chill any lawyers over whose head such sanctions are left hanging for an extended period. Such delay should be deemed legally impermissible.

Equally impermissible is a defendant's willful failure to identify defects in a complaint when it is given unlimited time to review the complaint prior to its filing and, instead of pointing out factual errors, invites the plaintiff to file. Such conduct followed by a Rule 11 motion turns the rule from a protective device for defendants into a weapon to chill and frustrate plaintiffs who seek to confirm their facts before they initiate suit. No defendant should be permitted to rely on Rule 11 when it has had a full opportunity to correct any error in a pleading before filing, and it has chosen not to do so.

Finally, Petitioner contends that Appellate Rule 38, not Rule 11, governs the imposition of sanctions on appeal. This result is required by the plain language of

both rules, with Rule 38 on its face setting forth the standard against which appeals are to be governed. Reliance on Rule 11 would frustrate legitimate appeals by lawyers whose reputations are called into question and who have substantial legal questions to argue on appeal. It would discourage legitimate, good faith appeals, for no valid reason. Any prevailing party in a Rule 11 proceeding may choose to rely on the district court's findings and reasoning on appeal, and an appellate court has ample procedures available to assure that streamlined appeals are possible in insubstantial cases. Were sanctions under Rule 11 automatically imposed against any litigant or lawyer who unsuccessfully appealed district court sanctions, an inequality between litigants who have been sanctioned and those have not been would be created: those who have been sanctioned in the district court would be discouraged from appealing, while those who unsuccessfully sought district court sanctions would be free to appeal without worrying about sanctions. Such a result would be unfair.

ARGUMENT

I. THE DISTRICT COURT ERRED IN IMPOSING RULE 11 SANCTIONS FOLLOWING DANIK'S DISMISSAL UNDER RULE 41(a)(1)(i)

As set forth above, on April 30, 1984, Danik filed a Rule 41(a)(1)(i) notice dismissal. The case was dismissed to conserve financial and manpower resources (J.A. 63-65), not because Danik or Petitioners believed that the claims lacked merit.[14] After the dismissal, cer-

[14] Danik's complaint alleged price-fixing, fostered by an exclusive dealing arrangement that excluded Danik, a paradigm antitrust violation. Nevertheless, Petitioner ultimately decided to voluntarily withdraw the case under Rule 41(a)(1)(i); that decision was based upon the burdens of litigating several cases simultaneously.

The affidavits which Respondents filed in support of both their their motion to dismiss and their Rule 11 motion were not persuasive refutations of the central theory of Danik's class action complaint. Respondents' affidavits denied that they had exclusive dealer arrangements in all major metropolitan areas. (*See* Attachments to District Court Docket Entry 12). But, as the affidavit of Mr. Hantzes, which was based on his investigation into several of the metropolitan areas mentioned in Respondents' affidavits, revealed, the arrangements that Respondents had with dealers in these areas might well have had aspects of exclusivity. (J.A. 18-21). Moreover, Respondents' affidavits completely failed to mention the locations within the major metropolitan areas of its various retailers. Because of the size of some markets, a combination of geographical separation among retailers plus active allocation by Respondents of lines of clothes would have achieved much the same result as a simple exclusive dealing arrangement. Although Danik's complaint alleged that the prices charged for Hart, Schaffner & Marx and Hickey-Freeman suits were inflated (J.A. 11-13), Respondents' affidavits did not deny this. Nor did Respondents' affidavits deny that the prices were relatively uniform in major metropolitan areas. And while Respondents' affidavits did deny pricing agreements between Respondents and retailers, Hart, Schaffner & Marx was forced to concede that it had recommended prices to retailers. (*See* Attachments to District Court Docket Entry 12). Such recommendations could well have promoted price fixing both as to a particular line of suits and as to other suits—*e.g.*, Hickey-Freeman—as well. Thus, at the time that Petitioner voluntarily dismissed its complaint, it had no solid evidence that the allegations made by Danik were not true in all material respects.

certainly Cooter & Gell and Danik, and probably even Hartmarx, believed that the case was finished. Nevertheless, nearly four years later, after Mr. Cooter had appeared before Judge Gasch in the *Kuwait* case, the District Court, *sua sponte*, issued its order declaring Defendants' Motion for Sanctions, filed years before, "ripe for decision." Cert. Appendix at 32a.

A. The Plain Language of Rule 41(a)(1)(i) Provides An Unfettered Right To Dismiss

Unlike other cases in which the Court is asked to construe a statute to determine congressional intent, in this case the Court must construe rules which it approved and sent to Congress. Petitioner contends that the best read-

ing that fosters the goals of the Federal Rules of Civil Procedure ("[the rules] shall be construed to secure the just, speedy and inexpensive determination of every action," Fed.R.Civ.P. 1), is that a plaintiff has the right to dismiss an action under Rule 41(a)(1)(i) prior to the filing of a responsive pleading or a motion for summary judgment, and that the dismissal does not leave the plaintiff or its counsel subject to Rule 11 sanctions.

On its face, Rule 41(a)(1)(i) states that "an action may be dismissed by the plaintiff without order of court" prior to the service of an answer or motion for summary judgment, and that unless otherwise stated in the notice of dismissal it is without prejudice. The language suggests that a plaintiff is permitted to withdraw an action without penalty as long as the action has not proceeded to the point of an answer or a summary judgment motion. This reading of Rule 41(a)(1)(i) is supported by an examination of Rule 41(a)(2), which provides that, except for dismissals under (a)(1), "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." It is apparent that this Court intended that the power of a district court to enter orders—*e.g.*, for payment of fees or costs—as a condition of a dismissal should be restricted to dismissals under 41(a)(2) and does not apply to dismissals under 41(a)(1).

If Rule 11 sanctions may be imposed following a voluntary dismissal under Rule 41(a)(1)(i), there is no longer a right of a dismissal without prejudice, since the award of sanctions, as in the underlying case herein, may signify a district court's judgment on the merits. Moreover, the availability of sanctions may discourage dismissals and encourage parties or counsel to continue cases in order to assure that a more complete record is available to respond to Rule 11 motions or anticipated motions. The lesson of the instant case, for example, might well be that dismissal should not have been sought,

and counsel should instead have engaged in discovery in order to demonstrate more fully the merits of the plaintiff's position or the extent to which that position was actually justified when the complaint was filed.

Perhaps the clearest problem with reading Rule 11 as permitting sanctions even after a dismissal under Rule 41(a)(1)(i) is that the language of Rule 11 purports to require a court to impose "an appropriate sanction" for a violation. As one commentator has noted, "[t]here are no limits placed on judicial creativity in fashioning an appropriate sanction." [15] The same commentator has observed that "[t]he courts' authority to dismiss an action, pleading, claim or defense as a remedy for a Rule 11 violation is well settled." [16] If a court may impose a range of sanctions, including dismissal of an action with prejudice, which is nowhere prohibited by Rule 11, the plain language of Rule 41(a)(1)(i)—which provides for dismissal *without prejudice*—can be circumvented by the power conferred by Rule 11.

Consistent with the plain language of Rule 41, Petitioner urges this Court to adopt the rulings of *Johnson Chemical Co., Inc. v. Home Care Products, Inc.*, 823 F.2d 28 (2d Cir. 1987), and *Santiago v. Victim Services Agency*, 753 F.2d 219 (2d Cir. 1985), that once a Rule 41(a) dismissal is filed, the district court is deprived of authority to impose Rule 11 sanctions. *But see Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 1101 (1988), (explicitly rejects *Santiago* and allows post-dismissal sanctions); *Greenberg v. Sala*, 822 F.2d 882 (9th Cir. 1987); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988).

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[15] G. Joseph, Sanctions: The Federal Law of Litigation Abuse § 16B., at 217 (1989).

[16] *Id.*

In reversing a post-dismissal award of attorney's fees, the Second Circuit in *Santiago* stated that, "[o]nce the plaintiff has dismissed the action . . . the Court loses all jurisdiction over the action." *Santiago*, 753 F.2d at 221. In *Johnson Chemical Co., Inc. v. Home Care Products, Inc.*, 823 F.2d at 30, the district court had granted the defendant's motion to vacate the plaintiff's voluntary dismissal and sanctioned the plaintiff under Rule 11. Reversing the trial court, the Second Circuit held that the plaintiff has the "unfettered power" to file a notice of dismissal before an answer or motion for summary judgment has been filed. *Id.* (citing *Santiago*, 753 F.2d at 221). The reviewing court concluded that since the plaintiff was plainly entitled to a voluntary dismissal, the district court lost all jurisdiction after the plaintiffs voluntarily dismissed, and therefore, Rule 11 sanctions could not be imposed. *Id.* at 31.

Similarly, the Fifth Circuit has consistently held that Rule 41(a)(1)(i) means just what it says. *See Williams v. Ezell*, 531 F.2d 1261 (5th Cir. 1976) (where defendants filed neither an answer nor a motion for summary judgment prior to plaintiffs' notice of voluntary dismissal, district court had no power or discretion to deny plaintiffs' right to dismiss or to assess attorney's fees against them); *see also Carter v. United States*, 547 F.2d 258 (5th Cir. 1977) (defendants' motion to dismiss on the merits is not the equivalent of an answer and does not prevent plaintiffs from invoking unfettered right to voluntary dismissal).[17]

B. The History Of Rule 41(a)(1)(i) Supports A Finding Of An Unfettered Right To Dismiss

The history of Rule 41(a)(1)(i) supports the construction urged by Petitioner. When the rule was first adopted in 1938, it provided the plaintiff with a right to dismiss

[17] *Williams* and *Carter* are not Rule 11 cases.

prior to the filing of a responsive pleading. In 1948, the Court amended the rule to provide that the plaintiff's unilateral right to dismiss prior to the filing of an answer did not apply when a motion for summary judgment was filed prior to the filing of the notice of dismissal. The Advisory Committee's Note to the 1948 amendment stated that "[t]he change in Rule 41(a)(1)(i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer." 5 F.R.D. 433, 465-66 (1946). This language recognized that Rule 41(a)(1)(i) was intended to provide for "unlimited dismissal" except as otherwise indicated in the language of the rule.[18] Over the years, suggestions have been made that the unlimited dismissal power be eliminated,[19] but this Court has not acted upon these suggestions.

Rather, the Court has retained Rule 41(a)(1)(i) as a simple, convenient device which permits a plaintiff to withdraw from a case before a defendant has been burdened with extensive litigation. The notice of dismissal is effective when it is filed with the clerk even before service.[20] As one circuit has said, the notice "itself closes

[18] One limitation on Rule 41(a)(1)(i) is that it is subject to Rule 23(e), which states that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." In the underlying class action suit brought by Danik against Respondents, Danik sought and obtained court approval to dispense with notice, and the parties and the lower courts have treated the notice of dismissal as effective.

[19] *See, e.g.*, Note, *Federal Civil Procedure: Voluntary Dismissal Under Rule 41(a)(1)*, 1962 Duke L.J. 285; Note, *Absolute Dismissal Under Federal Rule 41(a); The Disappearing Right of Voluntary Nonsuit*, 63 Yale L.J. 738 (1954).

[20] *Scam Instrument Corp. v. Control Data Corp.*, 458 F.2d 885 (7th Cir. 1972).

the file. There is nothing the defendant can do to fan the ashes of that action into life and courts have no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court."[21] Voluntary dismissal early in an action fosters the most important goals of the Federal Rules of Civil Procedure, and those goals would be frustrated were voluntary dismissals deemed to be subject to subsequent imposition of sanctions under Rule 11.

C. The Policies Behind Rules 11 And 41(a)(1)(i) Are Furthered By Allowing Plaintiffs An Unfettered Right To Dismiss

Even when dismissals are noticed, subsequent Rule 11 proceedings, as in this case, may protract litigation, result in wasteful district court proceedings, and produce appeals either by lawyers who are sanctioned or by those who have been unsuccessful in seeking sanctions. Instead of being an efficient device to end litigation before it has really developed, which Rule 41(a)(1)(i) has been, it would not end litigation and might well be underutilized by lawyers who would hesitate to dismiss lest a district court wrongly infer that the reason for the dismissal is recognition of a problem with the case that predated the filing of a complaint.

There is no sound reason in experience or policy for construing Rule 11 to permit sanctions once a Rule 41(a)(1)(i) dismissal occurs. In egregious cases, attorney misbehavior may be certified to appropriate bar authories.[22] Or, a court might consider suspending a lawyer's right to practice before it as a result of clearly improper conduct.[23]

Apart from the unique timing question presented by this case—where the court below imposed sanctions almost *four years* after dismissal—there are several reasons to prefer the Second Circuit's holdings in *Santiago* and *Johnson* to that of *Szabo* and its progeny.[24] First, there is the fact that Rules 11 and 41 simply admit to no exception to the "bright line" of the plaintiff's unfettered power to dismiss voluntarily and with finality pursuant to Rule 41(a)(1)(i). *Johnson*, 823 F.2d at 30. If this Court had wished to adopt such an exception, it could have done so, and neither a district court, nor a court of appeals may create authority withheld by the rules.

Second, permitting even this encroachment upon the letter of Rule 41 is to disapprove the many and varied cases interpreting its provisions strictly. *See* 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 41.02[2] and [3] (2d ed. 1982) and cases collected therein. Many have tried and failed to chip away at the rule's straight-

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[21] *American Cynamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963).

[22] *See, e.g., McGoldrick Oil Co. v. Campbell*, 793 F.2d 649, 653-54 (5th Cir. 1986). The facts of *Danik* illustrate that Respondents could have called any information which they possessed and which rebutted the class action complaint to Petitioner's attention prior to filing anything in the district court, and by doing so they would have imposed a burden on Petitioner to investigate further to assure that its complaint rested on a sound factual and legal theory. Had Petitioner failed to condct an investigation, Respondents could have answered the complaint and included any defenses under Rule 12 in their answer. Once they did so, Petitioner would not have been able to seek a voluntary dismissal, and Rule 11 would have been available as a remedy for any failure on Petitioner's part to conduct a reasonable investigation. This course would advance the goals of the Federal Rules.

[23] *See, e.g., Donaldson v. Clark*, 819 F.2d 1551, 1557 n.7 (11th Cir. 1987) (en banc).

[24] These cases are discussed more fully at page 23, *supra*. In *Santiago*, 753 F.2d 219 and *Johnson*, 823 F.2d 28, the Second Circuit held that a Rule 41(a)(1)(i) dismissal deprived the trial court of jurisdiction to impose attorneys fees (*Santiago*) and Rule 11 sanctions. (*Johnson*). In *Szabo*, the Seventh Circuit allowed post-dismissal sanctions under Rule 11.

forward language without success for, as noted by the Sixth Circuit, "although Rule 41 has been amended three times since 1948, it has not been broadened to include other motions or pleadings which would bar a dismissal by notice." *D.C. Electronics, Inc. v. Martron Corp.*, 511 F.2d 294, 296 (6th Cir. 1975). This consideration—that many years of entirely consistent decisions affirming the unfettered power of a plaintiff to voluntary dismissal would be swept aside by carving an exception for Rule 11 proceedings—was not addressed by *Szabo* or its progeny. This is no small concern; rejection of the accumulated jurisprudence surrounding Rule 41 is to invite other defendants and the district courts to attempt to further transform that which has heretofore been a settled and immutable rule.[25] The *Johnson* opinion respects these precedents and recognizes the value of a settled rule for litigants, while *Szabo* undermines the clarity that previously existed. This indirect and perhaps unintended consequence not only is inconsistent with better jurisprudence but also potentially conflicts with a stated purpose of Rule 11 itself—to increase the efficiency of the judicial system. *See* Fed. R. Civ. P. 11 Advisory Committee Notes, 97 F.R.D. 165, 198 (1983).

Moreover, a finding that authority is retained to impose Rule 11 sanctions after a voluntary dismissal leads to the inevitable question: for how long? In this case, it was nearly four years; in the next case it may be ten years, or indefinitely. A finding that a Rule 41 notice dismissal divests the trial court of authority to impose Rule 11 sanctions avoids this inevitable problem of the length of time in which a court may impose sanctions. The most critical aspect of this problem, as recog-

[25] For example, following a Rule 41(a)(1)(i) dismissal by plaintiff, the district court could attempt to impose sanctions pursuant to Fed.R.Civ.P. 37, or "make such order as it deems just" pursuant to Fed.R.Civ.P. 12(e), including the imposition of costs and fees.

nized by the Court of Appeals, is the chill felt by the lawyer who has other business before the same court while an unrelated Rule 11 motion pends. *See* Cert. Appendix at 10a. Indeed, that is precisely what happened here: nearly four years later, immediately after Mr. Cooter tried another vigorously contested case before Judge Gasch, the Court decided—*sua sponte*—that the long-forgotten Rule 11 motion was "ripe for decision." Under the holding of the Court of Appeals, counsel will proceed very cautiously—at the risk of the case of another client—when appearing before a federal judge who has not yet decided a possibly old and clearly unrelated Rule 11 motion. This problem is exacerbated by the *sua sponte* nature of Rule 11. The language of the rule makes it clear that sanctions may be imposed on the court's own initiative. *See* Advisory Committee Notes, 97 F.R.D. at 197, 200. Thus, in the absence of any cut-off on the right to impose sanctions, counsel will necessarily proceed cautiously in all subsequent litigation before a federal judge.[26]

One other, very practical problem of waiting for so many years is the determination of what law to apply to the previous conduct. Indeed, when Judge Gasch issued his opinion in February 1988, he relied on a body of Rule 11 law that had developed considerably since the 1983 amendments. Cert.P.App. 23a-26a. Thus, he judged

[26] Nevertheless, if this Court finds that a trial judge does retain jurisdiction to decide a Rule 11 motion following Rule 41(a)(1)(i) notice dismissal, it should direct the federal courts, through their local rules, to prescribe a definite time period during which the court retains jurisdiction to impose sanctions. *See, e.g., White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445 (1982) (suggesting that district courts adopt local rules establishing timeliness standards for the filing of claims for attorneys fees). Absent a local rule, it is submitted that jurisdiction be retained only for a reasonable period of time. Cooter & Gell respectfully urges this Court to find, as a matter of law, that nearly four years is too long a time to retain jurisdiction.

Cooter & Gell's 1983 conduct by caselaw and judicial and scholarly thinking about Rule 11 that developed in the following years.[27]

II. THE IMPOSITION OF RULE 11 SANCTIONS SHOULD BE SCRUTINIZED UNDER VARYING STANDARDS OF REVIEW

Rule 11 requires differing standards of appellate review that reflect the varying functions which trial courts perform in deciding whether to impose sanctions and the appropriateness of particular sanctions. The District Court here was called upon to make a number of different determinations in the course of considering the Rule 11 motion. First, it had to determine what the Petitioner did or failed to do, which involved fact-finding similar to that which is required whenever a court is called upon to resolve disputed issues. This fact-finding is appropriately reviewed under a clearly erroneous standard. *See* Fed.R.Civ.P. 52(a).

Once the facts were found, the District Court had to decide whether they constituted a violation of the applicable legal standard which is set forth in Rule 11. In deciding, the District Court necessarily made a legal determination as to the sufficiency of the facts to support Respondent's claim of entitlement to sanctions. This determination is similar to that made by judges who are asked to grant summary judgment, to direct verdicts, and to render judgments notwithstanding verdicts, since Rule 11 sanctions may be imposed only when no lawyer who was acting reasonably under the circumstances would have filed the paper. The typical standard of appellate review is *de novo* consideration of this type of district court determination. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153-61 (1970) (summary judgment); *Neely*

[27] It should be noted that the complaint in this case was filed on November 29, 1983—not even three months after the effective date of the amended Rule 11. *See also supra* note 13.

v. Martin K. Eby Constr. Co., 386 U.S. 317, 322-26 (1967) (judgment notwithstanding the verdict); *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) (motion to dismiss).

Finally, if Rule 11 has been violated, the district court must determine what sanction "shall" be imposed. Since this determination involves a certain amount of equitable consideration and basic notions of fairness under the circumstances, the abuse of discretion standard is appropriate. But, even under this standard, it is important for the trial judge to set forth the reasoning that justifies the sanction selected. This is never more important than when a substantial financial penalty is sought to be imposed. If the financial penalty is intended to recompense an injured party for costs incurred, the findings that the district court makes in justification of the award are crucial to appellate consideration of the exercise of the judge's discretion.

Accordingly, a three-tier standard of review is appropriate for Rule 11. The Eighth and Ninth Circuits have adopted this precise approach: disputed factual determinations of the district court are reviewed under a "clearly erroneous" standard, *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986), and the legal conclusion that the facts constitute a violation are reviewed *de novo*. *Id.* Only the appropriateness of the sanctions imposed is reviewed under an abuse of discretion standard. *Id.*; *accord Kurkowski v. Volcker*, 819 F.2d 201, 203 n.8 (8th Cir. 1987).

In contrast to the approach adopted by the Eighth and Ninth Circuits, the D.C. Circuit has held that the district court is accorded wide discretion in determining whether factual or bad faith reasons exist which may give rise to sanctions under Rule 11 because "the district court has tasted the flavor of the litigation and is in the best position to make these kinds of determinations." *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174

(D.C. Cir. 1985).[28] Accordingly, a district court will be reversed if the Court of Appeals finds that it abused its discretion in finding the facts and/or applying the law of Rule 11 decisions to those facts. Once the district court determines that a violation has occurred, the selection of an appropriate sanction is committed to its discretion. *Westmoreland*, 770 F.2d at 1174. Thus, under *Westmoreland*, the factual findings of the district court, application of the law to those facts and both the amount and division of sanctions are measured against the "abuse of discretion" standard. *Id.* Consistent with *Westmoreland* and other D.C. Circuit cases, the D.C. Circuit appears to have evaluated all of the District Court's findings here under the "abuse of discretion" standard.[29]

Because of the stigma attached to the imposition of Rule 11 sanctions, however, Petitioner urges this Court to require the courts of appeals to more closely scrutinize the district courts' decisions to impose sanctions. Thus, Petitioner urges adoption of the three-tier standard of review, particularly *de novo* review of the determination that a violation occurred. *De novo* review of the critical

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[28] Other cases employing an across-the-board abuse of discretion standard include: *Thomas v. Capitol Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988); *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986); *Stevens v. Lawyers Mutual Liab. Ins. Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986).

[29] Although the Court of Appeals opinion does not specifically state what standard of review is employed to review the ultimate issue of whether a violation occurred, it does not appear to depart from the other D.C. Circuit cases which embrace the "abuse of discretion" standard for the various issues under review here. *See, e.g., Adams v. Pan American World Airways*, 828 F.2d 24, 32 (D.C. Cir. 1987) (district court's ruling denying sanctions may be overturned only if the court abused its "wide discretion"); *IBT (Airline Div.) v. Ass'n of Flight Attendants*, 864 F.2d 173, 176 (D.C. Cir. 1988) (district court is accorded "wide discretion" in determining lack of factual basis); *Westmoreland*, 770 F.2d 1168 (same).

Rule 11 determination will promote two goals: uniform application of the rule, and avoidance of damage to an attorney or law firm's reputation resulting from the discretionary rulings of a lone trial judge.

Judge Schwarzer, of the Northern District of California, writes that the application of Rule 11 is confused and that the courts' standards are unpredictable. Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988). In Judge Schwarzer's view, this raises an issue of fairness, because "[s]anctions may have penal consequences, including injury to a lawyer's reputation, investigation by state bar associations, and adverse effects on malpractice insurance coverage." *Id.* at 1017. Judge Schwarzer's views are not exaggerated. As a result of the recent publication of the D.C. Circuit's opinion in *Danik*, an investigation into this matter has been initiated by the District of Columbia Bar. In addition, opposing counsel in other cases have used the sanction award as a threat to various members of the law firm, including bringing it to the attention of the court in at least one other unrelated case. Such consequences may well be appropriate in particular cases, but fairness requires that those cases be defined with reasonable certainty and predictability. *Id.*

The lack of overall uniformity in Rule 11 sanctions has created an impression of arbitrariness, "as judges and jurisdictions with different sanctioning records have imposed varying sanctions on similarly situated violators." Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale L.J. 901, 903 & nn.17-22 (1988). Thus, one of the problems with the abuse of discretion standard is that it fails to put attorneys on notice of what conduct is expected of them.[30] Disagreement among judges has produced widely disparate results, thereby undercutting Rule 11's usefulness. *Id.* at 912-14. *See,*

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[30] *See* Schwarzer, 101 Harv. L. R. 1013 & n.22.

e.g., Eastway Construction Corp. v. City of New York, 821 F.2d 121, 126 (2d Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 269 (1987). (Pratt, J. dissenting) ("apparent disparities, even capriciousness, [now seem] to characterize much of Rule 11 jurisprudence"). As one commentator has noted:

> [I]t is apparent that not all judges agree, in philosophy or in practice, on precisely what conduct constitutes a violation of the rule. *Practicing under Rule 11 is like negotiating a minefield. You know there will be an explosion if you step on a mine. The trouble is, you don't know where the mines are.*

Joseph, *The Trouble With Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 A.B.A. J. 87, 88-9 (1987) (emphasis added).

Beyond not providing attorneys with fair notice of what conduct is expected of them, the abuse of discretion standard further chills creative litigation as it insulates the personal views of the trial court in the sanctioning process. For example, in a study sponsored by the Federal Judicial Center to examine the views of federal judges regarding Rule 11, it was discovered that some trial courts were more likely to sanction certain types of litigants than others. Civil rights litigants are particularly more likely to be sanctioned. Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 Washburn L.J., 337, 371-73 (1987) (citing S.M. Kassin, *An Empirical Study of Rule 11 Sanctions*, 38 & n.77 (Federal Judicial Center 1985)). Other studies have reached the same conclusion, and have specifically found that plaintiffs and their counsel are consistently sanctioned more frequently than defendants. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988).[31]

[31] The fear of many critics that Rule 11 would become part of every defendant's litigation bag was not ill-founded. The reported cases confirm that Rule 11 is being used disproportionately against plaintiffs, especially in certain types of litigation, including, as here, antitrust cases brought by small companies. Vairo, *supra*, 118 F.R.D. at 200.

Mindful of the role—albeit unconscious—that the personal views of trial judges play in judicial decision-making, the Ninth Circuit Court of Appeals has noted that there exists a great "risk when mandatory sanctions ride upon close judicial decisions. The danger of arbitrariness increases and the probability of uniform enforcement declines." *See* 26 Washburn L.J. at 371 n.142 (quoting *Golden Eagle Dist. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1541 (9th Cir. 1986)). To protect against the imposition of mandatory sanctions influenced by the personal views of the trial court, Petitioner respectfully urges a more particularized standard of review by the appellate court.

The Court of Appeals in this matter was as well positioned to judge the conduct of the parties as was the District Court. There was little "flavor" to the litigation in that barely five months elapsed from filing the complaint to its dismissal; there was never any live testimony; and all of the evidence submitted on the Rule 11 Motion was written, or part of the transcribed oral argument before the District Court.[32] Indeed, the questions presented here—apart from the amount and division of

[32] In fact, recognizing that this matter dealt with conduct of members of the bar, the Court of Appeals went well beyond the record in its questioning of the parties at oral argument. Transcript of Oral Argument at 72-73 [hereinafter "Transcript"]. For example, Mr. Cooter advised the Court of Appeals that, prior to filing the lawsuit, he had contacted sources within the men's clothing industry that confirmed the existence of retail price maintenance agreements for the Hartmarx and Hickey-Freeman merchandise. Because these sources had requested confidentiality, the fact of this inquiry was not presented to Judge Gasch during the 1984 argument on the Rule 11 motion. Transcript at 21-22; 35-38. Nevertheless, despite the Court of Appeals' concern about the importance of this matter involving the conduct of a member of the bar, its opinion focuses only on those matters that were specifically presented to Judge Gasch.

sanctions between attorney and client—are analogous to the appeal of the granting of a motion for summary judgment. As such, *de novo* review of the District Court's finding of a Rule 11 violation was entirely supportable. *Int'l. Union v. National Right To Work Legal Defense Foundation, Inc.*, 781 F.2d 928, 933 (D.C. Cir. 1986).

As set forth above in the Statement of the Case, the District Court imposed sanctions in a case where the following facts were undisputably true and implicitly regarded as irrelevant:

> 1. Petitioner had been informed about industry practice by its clients, who had substantial experience in the men's clothing business.
>
> 2. The allegations made by the clients with respect to price discrimination in the *Intercontinental* suit were corroborated by an independent investigation, and these allegations involved a number of cities outside the Washington area.
>
> 3. Prior to filing a complaint in the class action suit, Petitioner made telephone calls to several major cities and received information that corroborated the information they had received from their clients. The information was not inconsistent with a nationwide practice on the part of Respondents.
>
> 4. Prior to filing the complaint, Petitioner provided copies to Hartmarx's general counsel and to Respondent's outside counsel and offered to give them as much time as was required for them to analyze the complaint. Petitioner provided an extension of time when asked. No suggestion was made by Respondents that the allegations concerning exclusive dealing, which was the key to inflating prices according the complaint, were incorrect.
>
> 5. Respondents were fully aware that when representations had been made by Respondents concerning the prices charged to Danik's competitors in the Intercontinental case, Petitioner carefully and faithfully arranged to examine the relevant documents to ascertain whether the representations were correct. Although Petitioner concluded that Respondents' outside counsel had given them information that did not appear to be consistent with what Petitioner learned in discovery in the *Intercontinental* case, and expressed reservations about believing additional representations, at no time did Petitioner ever express any reluctance to investigate fully any information that might have suggested that its factual theory or the information provided by its clients was incorrect.
>
> 6. Petitioner had offered to make available for depositions any of its lawyers to explain their reliance on Danik's information and the ways in which they sought to corroborate it.

These facts were all revealed in the record before the Court of Appeals but, in the main, neither discussed nor given any weight in affirming the District Court. Petitioner submits that under a standard of *de novo* review, giving these facts appropriate consideration would have resulted in reversal of the District Court.

In addition to the ultimate question of whether sanctions should be imposed, *de novo* review is also appropriate for two other issues: whether the District Court applied appropriate procedures to the resolution of the Rule 11 issue; and whether the proponent of the motion should be estopped by its own conduct from benefitting from Rule 11.

Not only must the district court decide whether the facts support a Rule 11 claim, but the court must also decide what procedures are permissible and appropriate in making Rule 11 determinations. Procedural issues are questions of law, and appellate courts must determine whether district courts acted properly in making Rule 11 determinations, and in doing so they must decide for themselves the sufficiency of the procedures which were employed. Here, the District Court made no findings to

support its conclusion that the motion was "ripe for decision" or why four years was a reasonable delay. In the Court of Appeals argument, Judge Starr commented on the four year delay, but concluded that he was "not sure what we do with it." Transcript at 5. Petitioner submits that a four year delay in imposing sanctions is a procedure that would not withstand scrutiny under *de novo* review.

A *de novo* standard of review is also appropriate when, as here, a claim is made that a party seeking Rule 11 sanctions has failed to mitigate and is estopped from attributing to the plaintiff costs which mitigation would have avoided.[33] Whether there is a duty to mitigate and what the scope of the duty is are questions of law, and *de novo* review generally governs appellate review of such legal issues. *See Business Systems Leasing, Inc. v. Foothills Automotive Plaza, Inc.*, 886 F.2d 284, 287 (10th Cir. 1989) (duty to mitigate is issue of law and reviewed *de novo*); *R & O Elevator Co., Inc. v. Harmon*, 93 Bankr. 667, 670 (D.Minn. 1988) (same). Here, Respondents were given the complaint and unlimited time to review it. Nevertheless, Respondents failed to advise Petitioner of their position that the factual allegations were not well-founded. The impact of this failure should have been scrupulously re-examined by the Court of Appeals. The District Court observed that its research revealed no other case in which there were similar circumstances. (Cert. P. App. at 27a). This is not surprising, since it is unconscionable for a litigant who has been given an opportunity to review a complaint which has a core allegation—*i.e.*, the defendants are artificially inflating prices and using exclusive dealing arrangements as part of their collusive efforts to fix and inflate prices—to

[33] Judge Gasch made no specific findings of fact to support the amount of sanctions awarded. His failure to do so is particularly problematic here, as Respondents certainly could have mitigated their damages if they had advised Petitioner informally that there were problems with the draft complaint.

possess information that would readily refute the core allegation, to refrain from disclosing to the plaintiff the defendants' belief that the core allegation is erroneous, and thereafter to seek Rule 11 sanctions. As Respondents' counsel candidly stated in oral argument to the District Court "[t]he exclusive retailer policy allegation is repeated no less than 20 times in the class action complaint." (J.A. 47). Yet, it is this part of the complaint which is attacked in the Rule 11 motion, and Respondents could have brought to the plaintiff's attention any information bearing on this part of the complaint when they were afforded the opportunity to review it.[34]

Admittedly, in recent years this Court has moved towards deferential review of federal trial court decisions involving findings of ultimate fact going to the merits. Yet, that move has not been immutable. Although the Court stated in *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984), that the "clearly erroneous" standard set forth in Fed.R.Civ.P. 52(a) "applies to findings of fact, including those de-

[34] In the Court of Appeals, Respondents revealed for the first time that they had an "800" telephone number which they claimed Petitioner might have called to determine where Respondents' retailers were located. (Transcript at 51). The District Court was never informed of such a number, nor was the Court of Appeals told when the number was first instituted. Presuming, however, that the number was in use at the time that Petitioner gave a copy of its proposed complaint to the Hartmarx general counsel and to Respondents' outside counsel, it is apparent that both in-house and outside counsel deliberately chose not to disclose the existence of the telephone number to Petitioner. Had the number been disclosed, and had Petitioner failed to investigate it, a Rule 11 challenge might have been understandable. But Respondents did not disclose the number, and it is difficult to imagine a clearer failure to mitigate. Respondents cannot seriously complain that they were burdened in responding to Danik's complaint when they invited Danik to file it and deliberately chose not to call to Petitioner's attention basic information which was readily available to Respondents and which they could have provided to Petitioner at no cost.

scribed as 'ultimate facts' because they may determine the outcome of litigation," the Court also reaffirmed that in cases where there is a claim of denial of rights under the constitution, *de novo* review of the evidence is mandated. 466 U.S. at 509-11. *De novo* review is required, it seems, because the constitutional issues are too important to leave to the trier of fact. *Id.*

In determining the appropriate standard of review in *Pierce v. Underwood*, —— U.S. ——, 108 S.Ct. 2541, 2547 (1988), the Court focused on two "significant relevant factors": (1) the language of the governing statute; and (2) the sound administration of justice. There, in reviewing an attorney's fee award under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), this Court found that the statutory language suggested, but did not compel, deferential review. 108 S.Ct. at 2547. Here, a rule of this Court, not a statute, is being reviewed. This Court clearly established an objective, not a discretionary, standard in Rule 11. Whether a violation occurred is a question of law that requires *de novo* review. The mandatory nature of sanctions under the amended rule also militates in favor of *de novo* review. Once a violation is found the district court is given "discretion to tailor sanctions to the particular facts of the case." *See* Advisory Committee Notes, 97 F.R.D. at 200.

As to the "sound administration of justice," the inquiry is whether " 'one judicial actor is better positioned than another to decide the issue in question.' " *Pierce*, 108 S.Ct. at 2547 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Concluding that the "sound administration of justice" called for deferential review, this Court stated:

> . . . the question whether the Government's litigating position has been 'substantially justified' is precisely such a multifarious and novel question, little susceptible, *for the time being at least*, of useful generalization, and *likely to profit from the experience that an abuse-of-discretion rule will permit to develop.*

108 S.Ct. at 2548 (emphasis added). In contrast to the situation confronting the Court in *Pierce*, experience under amended Rule 11 has vividly demonstrated that uniformity and consistency are needed, and that the more widely-adopted abuse of discretion standard has resulted in confusion and inconsistency.

Moreover, the *Pierce* Court noted:

> It must be acknowledged that militating against the use of that standard in the present case is the substantial amount of the liability produced by the District Judge's decision. *If this were the sort of decision that ordinarily has such substantial consequences, one might expect it to be reviewed more intensively.* In that regard, however, the present case is not characteristic of EAJA attorney's fee cases. The median award has been less than $3,000.

108 S.Ct. at 2549 (emphasis added). As set forth above however, Rule 11 decisions do result in "substantial consequences"—both monetarily [35] and to the reputation of the attorney and the firm—thereby requiring more intensive review.

Under any standard, the district court should be required, by local rule or by practice in particular cases, to require that the court should award sanctions, if necessary, within a reasonable time after a case is terminated. A four-year delay in awarding sanctions is a clear abuse of discretion. It permits a district court to chill the behavior of any lawyer against whom a sanctions motion is pending or might be filed (or even raised *sua sponte* by the court) in every other case the lawyer

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[35] Petitioner was sanctioned $21,402.52 and Danik was sanctioned $10,701.26. In other cases, sanctions have been even greater. *See, e.g., Avirgan v. Hull*, 705 F. Supp. 1544 (S.D.Fla. 1989) (sanctions of $1,034,381.36); *In re Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986) (reversing award of $250,000 in sanctions).

has pending in that court. A greater chill on an attorney's ability to advocate for his clients is difficult to imagine.

III. ABSENT A FINDING THAT THE APPEAL WAS FRIVOLOUS, SANCTIONS SHOULD NOT BE IMPOSED FOR THE APPEAL

The Court of Appeals found that the District Court's award under Rule 11 should also include appellate expenses incurred in defense of that award, and remanded the case back to the District Court for a determination of those fees and costs. *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 897-98 (D.C. Cir. 1989); *accord Hays v. Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988).[36] Rule 11 does not speak to the issue of further fees on appeal. Rule 38 of the Federal Rules of Appellate Procedure provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award past damages and single or double costs to the appellee.

There was no finding by the Court of Appeals that Cooter & Gell's appeal was frivolous.[37] Indeed, on October 5, 1988, the Court denied Hartmarx's motion for summary affirmance of the District Court's imposition of sanctions and specifically instructed the parties to brief the issue of whether the Rule 41 voluntary dismissal divested the District Court of jurisdiction to impose sanctions. Moreover, the granting of certiorari by this Court further

[36] Interestingly, on September 29, 1989, another panel of the D.C. Circuit imposed appellate fees in a Rule 11 case by specifically finding the appeal to be frivolous under Fed.R.App.P. 38. *See Saltany v. Reagan*, 886 F.2d 438, 440 (D.C. Cir. 1989).

[37] Rule 38 and 28 U.S.C. § 1912 are read together to allow sanctions for frivolous appeals. *See* Joseph, *supra* note 15 at 408-409. Thus, in another case, if the appeal is found to be frivolous, Rule 38 and § 1912 will provide an adequate remedy, without expanding the reach of Rule 11.

buttresses Cooter & Gell's position that the appeal to the D.C. Circuit was not frivolous.

The Court of Appeals, relying upon *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 475 (7th Cir. 1984), based its award of sanctions for the appeal on the premise that "requiring a party to bear appellate expenses . . . 'could greatly offset the amount of the sanction and thus create a disincentive for seeking sanctions.'" Cert. Appendix at 14a (*quoting Tamari*, 729 F.2d at 475).[38] Conversely, however, requiring the losing party to bear the appellate expenses would create a disincentive to *non-frivolous* challenges to an award of sanctions. This result is particularly chilling where, as here, the District Court's imposition of sanctions is reviewed under an abuse of discretion standard.

In a typical lawsuit resulting in a money judgment to a plaintiff, a defendant's appeal very often offsets the amount of the judgment. Under the reasoning of the D.C. Circuit, this offset would create a disincentive for seeking the judgment in the first place. Nevertheless, absent a finding that the appeal is frivolous, each party bears its own appellate attorneys fees. There is no reason to deviate from this well-established rule in the case of Rule 11 sanctions. Non-frivolous appeals should not be discouraged, and a party who believes he has been wronged by the trial court should not be fearful of taking an appeal because to do so may compound the amount of fees awarded against him.

Moreover, the position adopted by the D.C. Circuit results in an obvious imbalance: those who have been sanctioned by the district court would be discouraged from appealing, while those who unsuccessfully sought district

[38] Any prevailing party in a Rule 11 proceeding can keep its appellate costs down by relying on the district court's findings and reasoning on appeal.

court sanctions would be free to assert a non-frivolous appeal without worrying about sanctions.

This case reveals the importance of allowing parties who have been sanctioned the right to appeal without fearing the imposition of further costs. The developing Rule 11 comment and caselaw cry out for a uniform and correct approach to the imposition of sanctions, and lawyers should not be penalized, as Petitioner was here, for attempting to clarify the law or bring it into conformance with what other courts have done. Petitioner has been unable to find any other case involving a four year delay in imposing sanctions; that delay, in and of itself, provides grounds for an appeal, given the chilling effect of the delay. To further sanction the appeal only further chills the zealousness of the federal bar, a result which is plainly wrong.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the District of Columbia Circuit be reversed, and remanded for further proceedings consistent with the legal arguments set forth above by Petitioner.[50]

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[50] If this Court rules in *Pavelic & Le Flore v. Marvel Entertainment Group*, 854 F.2d 1452, *cert. granted*, —— U.S. ——, 109 S. Ct. 1116 (1989), that sanctions may not be, as they were here, imposed against an entire law firm, Petitioner respectfully requests that this case be reversed on grounds of plain error. The Respondents here did not appeal the District Court's decision to impose sanctions against the firm, but not against any individual lawyer.

Respectfully submitted,

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November 30, 1989

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QUESTIONS PRESENTED

1. Whether, by voluntarily dismissing its client's complaint pursuant to Fed. R. Civ. P. 41(a)(1)(i), petitioner deprived the district court of jurisdiction to act on a motion for Rule 11 sanctions that was filed before the voluntary dismissal.

2. Whether the court of appeals, which determined that petitioner's admitted failure to conduct any inquiry with respect to fundamental allegations of the complaint was patently unreasonable, employed an improper "abuse of discretion" standard in reviewing the district court's decision that Rule 11 had been violated.

3. Whether the court of appeals correctly determined that the district court should award respondents attorney's fees reasonably incurred in successfully defending against petitioner's appeal of the Rule 11 sanctions.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to respondent Hartmarx Corporation, respondents include two wholly-owned subsidiaries of Hartmarx Corporation, Hart, Schaffner & Marx and Hickey-Freeman Co., Inc. Hartmarx Corporation has no parent companies or subsidiaries (except wholly-owned subsidiaries).

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-275

COOTER & GELL,
Petitioner,

v.

HARTMARX CORPORATION, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 875 F.2d 890. The opinion of the district court imposing Rule 11 sanctions on petitioner (Pet. App. 18a-31a) is reported at 120 F.R.D. 439.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1989. The petition for certiorari was filed on August 16, 1989, and was granted on October 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES OF PROCEDURE INVOLVED

On behalf of its client, petitioner filed a frivolous class action complaint against respondents. Pursuant to Fed. R. Civ. P. 11, the district court awarded respondents attorney's fees reasonably incurred in responding to that complaint. Rule 11 provides, in pertinent part:

> If a pleading, motion, or other paper is signed in violation of this rule, the court * * * shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Prior to the district court's fee award under Rule 11, the complaint was voluntarily dismissed pursuant to Fed. R. Civ P. 41(a)(1)(i), which provides, in pertinent part:

> Subject to the provisions of Rule 23(e) [governing class actions] * * * an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.

After affirming the district court's award of attorney's fees, the court of appeals remanded the case to the district court for an award of attorney's fees reasonably incurred in defending the Rule 11 order on appeal. Petitioner contends that Fed. R. App. P. 38 precluded the additional award in the absence of a finding that its appeal was frivolous. Rule 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT

A. Introduction

The Rule 11 award giving rise to this case followed years of litigation between Danik, Inc., a client of petitioner Cooter & Gell, and respondent Hartmarx Corporation ("Hartmarx") and various subsidiaries of Hartmarx. The litigation began when a Hartmarx subsidiary filed a breach of contract lawsuit against Danik arising from Danik's failure to pay for goods manufactured by the Hartmarx subsidiary. In response, Cooter & Gell brought four separate antitrust actions against Hartmarx companies, including two purported class actions. Cooter & Gell's actions had nothing to do with the resolution of genuine antitrust disputes and did not result in a single finding that Hartmarx or any of its subsidiaries had violated the antitrust laws. Rather, the lawsuits were a transparent effort to ward off Hartmarx's attempt to press its contract claim and, when that tactic failed, to force Hartmarx to run a litigation gauntlet in order to obtain and collect on a final judgment.

One of Cooter & Gell's class action complaints was based on allegations so flatly contrary to actual fact that Hartmarx sought sanctions under Fed. R. Civ. P. 11. Before imposing sanctions, the district court held a hearing on the motion and carefully reviewed affidavits from Cooter & Gell (J.A. 16-27) describing the law firm's prefiling inquiry into the basis for the allegations of that complaint, including affidavits of the two attorneys who signed the complaint, and deposition testimony of Danik's principal owner (*id.* at

28-40), who had verified the complaint. The record of the proceedings before the district court so clearly established that Cooter & Gell abandoned any pretense of fidelity to minimum professional standards before filing the complaint that the court of appeals found "no difficulty in affirming liability under Rule 11 here." Pet. App. 11a.

Strictly speaking, the inadequacy of petitioner's prefiling inquiry is not an issue encompassed by the three questions that this Court agreed to review. Predictably, however, petitioner has devoted a substantial portion of its opening brief to defending its conduct in the district court and to attacking that court's decision to impose sanctions. Because petitioner's recitation is frequently at odds with the facts, we are obliged to set the record straight. Moreover, this record well illustrates why vigorous enforcement of Rule 11 is critically important to eliminating the plague of ill-conceived and wrongly-motivated lawsuits that infects the federal courts.

B. The Repeated Antitrust Suits Against Hartmarx And Its Subsidiaries

Petitioner Cooter & Gell is a law firm based in Washington, D.C. Respondent Hartmarx is a holding company that manufactures and distributes men's clothing across the United States through various subsidiaries, including respondents Hickey-Freeman and Hart, Schaffner & Marx. For approximately three years, petitioner represented a Washington area clothing retailer, Danik, Inc., in four antitrust actions brought against Hartmarx and five Hartmarx affiliates.

The flurry of antitrust litigation followed in the wake of the filing of a breach of contract action

against Danik by Intercontinental Apparel, Inc., a Hartmarx subsidiary. Intercontinental alleged that Danik had failed to pay for approximately $100,000 of merchandise. Cooter & Gell, on behalf of Danik, filed a counterclaim alleging that Intercontinental had engaged in price discrimination in violation of the Robinson-Patman Act. In March 1984, the district court granted summary judgment in favor of Intercontinental on its breach of contract claim, and that judgment was affirmed on appeal. *Danik, Inc.* v. *Intercontinental Apparel, Inc.*, No. 84-5186 (D.C. Cir. 1985).[1] In February 1985, a jury returned a verdict for Intercontinental on Danik's Robinson-Patman Act counterclaim. The court of appeals again affirmed, stating that the issues raised in Danik's appeal were "inconsistent with applicable precedent, sound antitrust policy and common sense." *Intercontinental Apparel, Inc.* v. *Danik, Inc.*, No. 85-5284 (D.C. Cir. 1986).

In November 1983, while the litigation described above was proceeding in district court, Cooter & Gell prepared two different antitrust complaints against Hartmarx and several of its subsidiaries. Each of those complaints purported to be brought on behalf of Danik and a large class of men's clothing retailers. Petitioner presented drafts of the complaints to counsel for Hartmarx. Although Cooter & Gell now con-

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[1] Pleadings and court opinions in the three antitrust actions filed against Hartmarx other than the action that gave rise to Rule 11 sanctions were not included in the Joint Appendix submitted to this Court. However, all such pleadings and opinions cited herein were submitted to the court of appeals. For the convenience of this Court, copies were lodged with the Clerk at the time this brief was filed.

tends (Br. 7) that the complaints were not "procedural devices to promote a settlement in the [breach of contract] case," the record shows otherwise. In an affidavit submitted to the district court, one Cooter & Gell attorney specifically described how he had linked a favorable settlement of the original collection action to Danik's decision to proceed with the two class actions (J.A. 26-27):

> Prior to my filing these Complaints, I scheduled a meeting with counsel for [Hartmarx] in the underlying collection suit wherein I presented counsel with draft copies of those Complaints and outlined a settlement offer which encompassed the collection suit and the two class actions. I made clear at that meeting and in subsequent conversations * * * with counsel for [Hartmarx], that it was not my intention to simply "wash out" the collection with my forebearance in filing these class actions. I stated to counsel that I felt that [Hartmarx] faced more exposure from these class actions than did my client in the underlying collection suit, and that it was my intention to give [Hartmarx] an opportunity to consider settlement of the class action suits prior to the certification of the class actions, after which time I would no longer be able to engage in settlement discussions on my client's behalf alone.

Hartmarx rejected Danik's "settlement offer" and, true to its word, Cooter & Gell filed the two class action complaints in the United States District Court for the District of Columbia. J.A. 3-14; *Danik, Inc.* v. *Intercontinental Apparel, Inc.*, No. 83-3569 (D.D.C.) (Complaint filed November 29, 1983). Both lawsuits were assigned to Judge Oliver Gasch,

who was presiding over the initial breach of contract/Robinson-Patman Act litigation. On April 30, 1984, Cooter & Gell filed voluntary dismissal notices with respect to the two class actions. J.A. 1 (docket entry 28); *Danik, Inc.* v. *Intercontinental Apparel, Inc.*, No. 83-3569 (D.D.C.) (Notice of Dismissal filed Apr. 30, 1984). Shortly thereafter, petitioner filed motions to dispense with notice to the purported classes and, in July 1984, the district court granted the motions, making the dismissals effective.

In September 1984, Cooter & Gell filed yet another antitrust action against three Hartmarx subsidiaries and an unrelated clothing retailer in the United States District Court for the District of Maryland.[2] The Maryland court granted Hartmarx's motion to transfer the action to Judge Gasch on the grounds that the issues raised in the complaint were identical or substantially identical to the issues in one of the antitrust lawsuits described above. *Danik, Inc.* v. *M. Wile & Co.*, No. H-84-3417 (D. Md.) (Jan. 3, 1985). That action was then stayed pending final resolution of the original breach of contract Robinson-Patman Act litigation and was ultimately dismissed voluntarily in July 1986. *Danik, Inc.* v. *M. Wile & Co.*, No. 85-0246 (D.D.C.) (Notice of Dismissal filed July 2, 1986).

C. Cooter & Gell's Pre-Filing Inquiry In This Case

The complaint that gave rise to the district court's ruling that Cooter & Gell violated Rule 11 was one of the two class action complaints filed in November 1983. That complaint alleged that Hartmarx was

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[2] Petitioner makes no mention of this fourth lawsuit and incorrectly asserts (Br. 3) that only three lawsuits were filed against Hartmarx.

engaged in a massive nationwide antitrust conspiracy involving price-fixing, resale price maintenance, territorial exclusivity, and other "unfair competition practices." J.A. 3-14. The factual premise of the entire complaint was the allegation that Hartmarx sold Hart, Schaffner & Marx and Hickey-Freeman suits to only "one retailer in each major metropolitan area in the United States." *Id.* at 11. The complaint was signed by two attorneys from Cooter & Gell (C.A. App. 47) and was verified (J.A. 15) by Danik's president and principal owner.

Apart from the fact that exclusive dealerships are a common method of distribution in a variety of industries and are perfectly legal under federal antitrust laws, the allegation that Hartmarx systematically employed exclusive dealers was completely false. Affidavits from Hart, Schaffner & Marx and Hickey-Freeman executives established that "Hart, Shaffner and Marx suits are distributed to more than one retailer in each of fifteen major metropolitan areas save Washington, D.C.," and that "except in Washington, D.C. and Baltimore, Maryland, Hickey-Freeman suits are sold to more than one retailer in each of the same fifteen major metropolitan areas." Pet. App. 21a. "Indeed, these executives reported that each brand was sold to as many as 20 different retailers in some markets." *Id.* at 4a. The affidavits further established that neither Hart, Shaffner & Marx nor Hickey-Freeman had exclusive dealer agreements with any of their respective retailers. *Id.* at 21a.

After moving to dismiss the complaint, Hartmarx also moved for sanctions under Rule 11. In opposing the Rule 11 motion, petitioner submitted three affidavits that described the firm's pre-filing inquiry.

J.A. 16-17, 22-27. Both of the attorneys who had signed the complaint executed affidavits, as did a secretary employed by the law firm who had conducted the bulk of the firm's pre-filing investigation. In addition, a third attorney at the firm submitted an affidavit describing an investigation he had conducted after receiving the Hart, Schaffner & Marx and Hickey-Freeman affidavits. *Id.* at 18-21. Respondents did not challenge the accuracy of the statements made in the Cooter & Gell affidavits and the district court accepted the affidavits as true (as did the court of appeals). Those affidavits conclusively demonstrated petitioner's violation of Rule 11.

First, contrary to petitioner's repeated assertion in its brief before this Court that its client was the instigator of the allegations against Hartmarx (see Br. 5, 6, 7, 13, 14, 36, 37), petitioner's client testified that he had no information to support those allegations other than what he had been told by his attorneys (J.A. 33-34). See also Pet. App. 29a. The same was true with respect to all other material allegations of the complaint. J.A. 39. Thus, this case does not involve a situation where an attorney relied on the misguided assertions of a client in drafting the factual allegations of a complaint and was then confronted with Rule 11 proceedings. Just the opposite is true; *petitioner presented its client with unfounded accusations against Hartmarx and the client then signed off on those accusations.*

Second, the Cooter & Gell affidavits establish the clear insufficiency of the firm's pre-filing inquiry, which began and ended with a series of telephone calls to salesmen at a few randomly selected clothiers in Washington, D.C., Baltimore, Philadelphia, and

New York. J.A. 16-17. In each of those calls, the salesman purportedly said that he knew of only one retailer in his city that sold Hart, Schaffner & Marx suits. *Ibid.* But none of the salesmen even suggested that the supposed lack of additional Hart, Schaffner & Marx outlets was the result of an exclusive dealer policy. Moreover, in none of the calls was the salesman asked *anything* about Hickey-Freeman; in none was he asked *anything* about a refusal by Hartmarx to deal with any retailers; in none was he asked *anything* about restrictions on the territory in which Hartmarx authorized its retailers to sell its products; and in none was he asked *anything* about the prices for which Hart, Schaffner & Marx or Hickey-Freeman suits were sold in his city. Pet. App. 23a-24a. Despite its desire to establish that Hartmarx had an anticompetitive policy of nationwide scope, Cooter & Gell made no phone calls to retailers outside Washington, Baltimore, Philadelphia, and New York. *Id.* at 23a.

After it obtained the Hart, Schaffner & Marx and Hickey-Freeman affidavits that refuted the allegations of the complaint, the law firm chose to conduct an additional "investigation." This investigation consisted of a review of telephone directories in various major cities and additional phone calls to salesmen, aimed at determining whether Hartmarx had "an exclusive retailer agent policy" for the sale of Hart, Schaffner & Marx and Hickey-Freeman suits. J.A. 18-19. Even that skimpy investigation quickly revealed that multiple retailers existed for Hartmarx menswear in Los Angeles, Boston, and Philadelphia (one of the four cities encompassed by petitioner's original investigation). *Id.* at 19-20. Despite confirming what the Hart, Schaffner & Marx and

Hickey-Freeman affidavits had established—that the fundamental factual premise of the complaint was wrong—petitioner and its client opposed Hartmarx's motion to dismiss (and the Rule 11 motion). Litigation of the unfounded complaint continued for three months before petitioner filed a notice of voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i). Because the complaint had been brought as a class action, however, dismissal was not effective until after the district court waived notice to putative class members. The district court did so on July 30, 1984.

D. The Decision Of The District Court

Six weeks after the complaint was voluntarily dismissed, the district court held a hearing on the Rule 11 motion. In December 1987, the court ordered Hartmarx to submit a statement of costs and attorney's fees. Pet. App. 32a. Cooter & Gell and Danik (now represented by other counsel) separately filed objections to the fee request and reiterated their arguments as to why the court should deny the Rule 11 motion. In February 1988, the court granted the motion, holding that the "pre-filing inquiry into the facts underlying these allegations was grossly inadequate." *Id.* at 23a. The court awarded Hartmarx a total of $32,103.78 in costs and attorney's fees. It assessed two-thirds of the award ($21,402.52) against petitioner and the remainder ($10,701.26) against its client. *Id.* at 29a.

With respect to the claim that Hartmarx maintained exclusive agreements with one retailer in every major metropolitan area in the United States, the district court found two "obvious deficiencies" in Cooter & Gell's pre-filing inquiry. Pet. App. 23a. "First, it concentrated solely upon Hart, Schaffner

and Marx menswear and thus in no way justified the claim of exclusive retail agency arrangements for Hickey-Freeman apparel. Second, it was limited to four eastern cities and consequently provided no support for the allegation that exclusive arrangements existed in *every* major metropolitan area." *Ibid.* (emphasis in original). In addition, the court took Cooter & Gell to task for the anemic nature of its investigation within those four cities. Specifically, the law firm "contacted only a few retailers in cities where dozens of retailers were in business" and directed its telephone calls to salesmen, without attempting to contact "management personnel who might have personal knowledge of the alleged exclusive retail agency policy." *Id.* at 24a.

The district court also pointed out that, even if Hartmarx had been party to exclusive dealing agreements, such agreements "by themselves, are not per se violative of antitrust laws." Pet. App. 24a. Exclusive dealing arrangements are analyzed under the "rule of reason" and can give rise to liability only if an antitrust plaintiff is able "to plead, and show, anticompetitive effects" flowing from the arrangements. *Ibid.* The court found that Cooter & Gell "failed to make any investigation whatsoever into the factual basis" for a claim that Hartmarx's distribution policies had brought about the anticompetitive effects necessary to prove an antitrust violation. *Ibid.*

E. The Decision Of The Court Of Appeals

Cooter & Gell appealed and the court of appeals affirmed.[3] The D.C. Circuit rejected the argument,

[3] Danik separately appealed the award of Rule 11 sanctions, but that appeal was dismissed for failure to prosecute. Pet. App. 2a.

raised for the first time on appeal, that the voluntary dismissal of Danik's complaint had deprived the district court of jurisdiction to rule on Hartmarx's Rule 11 motion. The court explained (Pet. App. 9a-10a):

> Rule 11 sanctions are meant to deter the filing of unfounded pleadings, which is an abuse of the judicial process. As in criminal contempt, the court has an interest in deterring such conduct independent of the burdened party's interest in recovering its expenses. Accordingly, a court may award Rule 11 sanctions or issue a contempt citation *sua sponte*. * * * In relevant respects, therefore, Rule 11 is analogous to criminal contempt; the systemic interest in its proper functioning requires that it be available in appropriate circumstances notwithstanding a private party's effort to cut its losses and run out of court, using Rule 41 as an emergency exit.

The court of appeals also reviewed the record that established Cooter & Gell's liability under Rule 11. Like the district court, it accepted Cooter & Gell's own "account of their efforts" prior to filing the complaint. Pet. App. 11a. And that account was enough to demonstrate the law firm's violation of the Rule: "It is impossible to see how 'no inquiry' could be a 'reasonable inquiry' with regard to the [Hickey-Freeman] allegation or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere." *Ibid.* Because those deficiencies went "to the heart of the complaint," the court below found it unnecessary to consider whether Rule 11 was violated by Cooter & Gell's failure to inquire into the anticompetitive effects essential to a rule of reason claim. *Id.* at 13a.

In addition, the court of appeals rejected Cooter & Gell's contention that the district court abused its discretion in setting the amount of the sanction. *Id.* at 13a-14a.

Finally, the court of appeals agreed with Hartmarx that it was entitled to return to the district court and request an additional award for attorney's fees reasonably incurred in defending the Rule 11 award on appeal. Borrowing from its earlier decision in *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168, 1179 (D.C. Cir. 1985), the court noted that "[i]t is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many litigants in [Hartmarx's] position to conclude that the vindication of the Rule 11 interests is not worth the candle." Pet. App. 14a. Accordingly, the court of appeals remanded the case to the district court for the limited purpose of determining the amount of additional fees due Hartmarx. *Id.* at 16a.

SUMMARY OF ARGUMENT

Rule 11 of the Federal Rules of Civil Procedure prohibits pleadings and other court filings that lack a reasonable legal or factual basis or that are motivated by an improper purpose. Once the district court finds a violation, it is *required* to impose an appropriate sanction. The Rule allows the court discretion in selecting the sanction, and expressly authorizes an order requiring the violator to pay the expenses reasonably incurred by the victim "because of" the violation, including a reasonable attorney's fee.

Petitioner, on behalf of its client, filed a baseless antitrust complaint against respondents. The district court found that the complaint violated Rule 11 and

ordered petitioner and its client to pay respondents the attorney's fees reasonably incurred as a result of the violation. After fully reviewing the record, the court of appeals found "two obvious deficiencies" in petitioner's pre-filing inquiry and therefore had "no difficulty in affirming liability under Rule 11." In addition, the appellate court remanded the case to the district court for an award of attorney's fees reasonably incurred in defending the Rule 11 sanction on appeal.

Petitioner seeks to avoid the consequences of its actions in a number of ways. First, it argues that because it dismissed its frivolous lawsuit voluntarily, the district court had no authority to rule on the Rule 11 motion that was pending at the time of dismissal. Second, it argues that the court of appeals was too deferential in reviewing the district court's order imposing the sanction and that the case should be remanded for review under a more searching standard. Finally, it argues that the court of appeals had no authority to preserve the deterrent effects of the sanction by requiring that petitioner pay the costs incurred by respondents in defending the Rule 11 award on appeal. None of these arguments has any basis in the language or underlying policies of Rule 11.

Rule 11 itself contains no exception for violators who voluntarily dismiss their cases before the district court has an opportunity to impose sanctions. Indeed, creating such an exemption would serve only to undercut Rule 11's broad policy of deterring the filing of frivolous or improperly motivated lawsuits. If plaintiffs were permitted to escape sanctions merely by dismissing their cases without prejudice, the courts would be burdened with additional unnecessary litigation and defendants would be forced to

commit resources to defend claims that have no merit whatever. Fortunately, Fed. R. Civ. P. 41(a)(1), which governs voluntary dismissals, in no way requires these deleterious results. Rule 41 states only that a plaintiff may voluntarily dismiss its complaint without prejudice prior to service of an answer or motion for summary judgment. The imposition of Rule 11 sanctions following a voluntary dismissal does not affect that guarantee.

The stringent standard of review that petitioner asks this Court to establish also would undermine the policies of Rule 11. But the Court need not—and should not—reach this issue because it plainly would have no effect on the outcome of this case. After thoroughly reviewing the record compiled on the Rule 11 motion, the court of appeals concluded that "[i]t is impossible to see how 'no inquiry' could be a 'reasonable inquiry' * * * or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere." Plainly, this "obvious[ly] deficien[t]" inquiry would constitute a violation of Rule 11 no matter what the standard applied by the court of appeals. In any event, if this Court desires to reach the standard of review issue, it should apply the analysis established in *Pierce* v. *Underwood*, 108 S. Ct. 2541 (1988), and adopt the abuse of discretion standard currently employed by nine circuits.

Finally, petitioner's effort to restrict the ability of district courts to require payment of attorney's fees reasonably incurred in defending Rule 11 awards on appeal must be rejected. The Rule expressly permits courts to award fees incurred "because of" the violation, and fees incurred in defending a Rule 11 award on appeal clearly satisfy that standard. Moreover, the policies of the Rule demand this result. If vic-

tims of Rule 11 violations were not compensated for expenses incurred in sucessfully defending Rule 11 awards on appeal, they would often have little incentive to resist challenges to such sanctions. That would impose additional costs on the judicial system and would undermine the usefulness of Rule 11 as a deterrent to frivolous and improperly motivated filings.

ARGUMENT

I. DISMISSAL OF A LAWSUIT WITHOUT PREJUDICE UNDER FED. R. CIV. P. 41(a)(1)(i) DOES NOT DEPRIVE THE DISTRICT COURT OF AUTHORITY TO IMPOSE RULE 11 SANCTIONS FOR PRE-DISMISSAL CONDUCT

Petitioner contends (Br. 20-30) that Danik's voluntary dismissal of the lawsuit against Hartmarx pursuant to Fed. R. Civ. P. 41(a)(1)(i)—which occurred *after* Hartmarx filed its motion for Rule 11 sanctions—deprived the district court of the authority to impose sanctions in this case. Adoption of that contention would, of course, open a gaping loophole in Rule 11. Any plaintiff that believed it might be sanctioned for the filing of a baseless complaint could inflict the harm the Rule is intended to prevent, yet avoid any penalty by dismissing its case before the court has an opportunity to impose a sanction. Consequently, defendants would be put to the burden and expense of defending against baseless claims, and the judicial system needlessly would incur an increase in its already considerable case load. Such results are completely at odds with the salutary purposes of Rule 11 and cannot be justified by either the language or the policies of Rule 41.

Rule 11 expresses an unambiguous mandate to bench and bar. The Rule forbids attorneys to file court papers that lack a reasonable factual or legal basis or that have been activated by an improper pur-

pose. Furthermore, it *requires* courts to impose an appropriate sanction upon attorneys (and/or their clients) who file papers that violate the Rule. The Rule on its face admits of *no* exceptions. Nonetheless, petitioner would have this Court fashion a huge exception for attorneys who file court papers that violate Rule 11 but who dismiss their clients' lawsuits voluntarily before the court imposes sanctions.

Petitioner's proposed exception is entirely inconsistent with the purposes of Rule 11. The drafters of the Rule intended to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." Rule 11, Advisory Committee Note, reprinted at 97 F.R.D. 165, 198 (1983); see also *Pavelic & LeFlore* v. *Marvel Entertainment Group*, No. 88-791, slip op. at 3 (Dec. 5, 1989) (Marshall, J., dissenting) ("the Rule is *explicitly* designed to deter improper pleadings, motions, and papers") (emphasis in original). This policy would be utterly undermined if the signers of baseless complaints could obtain a reprieve merely by withdrawing their cases prior to the imposition of sanctions. As the court below cogently explained (Pet. App. 8a):

> If a party could immunize itself from a meritorious Rule 11 motion by voluntarily dismissing its case, the risks associated with the filing of an inadequately investigated complaint would be significantly diminished; and as the price of such misconduct fell, of course, its frequency would rise.

Indeed, the exemption advocated by petitioner would prove particularly useful to the most egregious violators of Rule 11—those who file a complaint for an improper purpose. If a party desires to use the litigation process for the purposes of harassment, the filing of a complaint is likely to serve that improper goal. The initiation of a lawsuit imposes on the defendant immediate economic, logistic, and possibly emotional burdens. Moreover, as happened here, the allegations in the lawsuit may attract public attention, thereby causing harm to the defendant's reputation and/or business.[4] Thus, substantial harm to the defendant, as well as to the integrity of the legal system, may be accomplished when or shortly after a complaint is filed. "To hold that a district court has no power to order sanctions after a voluntary dismissal is to emasculate Rule 11 in those cases where wily plaintiffs file baseless complaints, unnecessarily sap the precious resources of their adversaries and the courts, only to insulate themselves from sanctions by promptly filing a notice of dismissal." *Schering Corp.* v. *Vitarine Pharmaceuticals, Inc.*, Nos. 89-5309, 89-5310, slip op. at 13 (3d Cir. Nov. 14, 1989) (1989 U.S. App. LEXIS 17064).[5]

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[4] See *Dash's Brings Suit Against Hartmarx*, Washington Post, Dec. 1, 1983 at F1.

[5] Amici Association of Trial Lawyers of America ("ATLA") and Public Citizen assert (ATLA Br. 10; Pub. Cit. Br. 7) that defendants could foreclose the voluntary dismissal option by filing an answer and, if they so desire, a Rule 12(c) motion for judgment on the pleadings. The last thing the judicial system needs, however, is an incentive for defendants to file unnecessary answers or motions, thereby triggering a time-consuming and expensive discovery process. Moreover, as the court below aptly concluded (Pet. App. 8a), "[u]nder Rule 11, * * * the defendant may stand on its motion to dismiss coupled with a motion for sanctions—as Hartmarx has done—and need not incur the burden of further pleadings. It is no answer to say that the defendant may preserve its Rule 11 motion only by incurring further unnecessary costs."

To make matters worse, the exemption advocated by petitioner cannot logically be limited to violators of Rule 11. Contemnors and violators of 28 U.S.C. § 1927 also would be immune from sanctions under its reading of Rule 41. And yet, as the Seventh Circuit has pointed out, it would be an absurd system indeed in which a litigant could avoid the consequences of a contempt of court merely by voluntarily dismissing its lawsuit before the court has a chance to respond to the contempt. *Szabo Food Serv., Inc.* v. *Canteen Corp.*, 823 F.2d 1073, 1079 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1101 (1988). Similarly, it strains logic to suggest that an attorney who vexatiously multiplies legal proceedings can escape penalty under 28 U.S.C. § 1927 merely by persuading his client to voluntarily dismiss under Rule 41.[6]

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[6] ATLA contends (ATLA Br. 8-9) that depriving district courts of power to punish contempt or violations of Rule 11 or Section 1927 after a voluntary dismissal will not alter the level of deterrence or prevent the victims of abusive litigation tactics from obtaining redress. According to ATLA, victims of Rule 11 and Section 1927 violations may bring a state common law action for malicious prosecution or abuse of process or an independent federal action under Section 1927. Meanwhile, the court that is the victim of a contempt may refer the matter to local disciplinary authorities or, according to petitioner (Br. 26-27), suspend the attorney from practicing before it.

This argument is completely at odds with a core purpose of the Federal Rules in general and Rule 11 in particular: reducing inefficiency in the rendering of justice. ATLA wants the judiciary to do in two separate proceedings what it easily and more effectively can do in one. But what conceivable benefit could be derived from denying the court that has overseen a lawsuit from beginning to end the power to rule on a

In light of the violence that petitioner's proposed exemption would do to the language and policies of Rule 11, it is not surprising that, with only one exception, every court to consider this contention has rejected it. See *Danik, Inc.* v. *Hartmarx Corp.*, Pet. App. 6a-10a; *Schering*, slip op. at 10-13; *Muthig* v. *Brant Point Nantucket, Inc.*, 838 F.2d 600, 603-604 (1st Cir. 1988); *Greenberg* v. *Sala*, 822 F.2d 882, 885 (9th Cir. 1987) (per curiam); *Szabo*, 823 F.2d at 1077-1079; *Kurkowski* v. *Volcker*, 819 F.2d 201, 203 (8th Cir. 1987). See also *Smith* v. *Phillips*, 881 F.2d 902, 904 (10th Cir. 1989) ("[a] court may have jurisdiction to order Rule 11 sanctions for conduct that occurred before a case was dismissed") (dictum); *Balfour Guthrie, Inc.* v. *Hunter Marine Transp., Inc.*, 118 F.R.D. 66, 78 (M.D. Tenn. 1987); Note, *The Use of Rule 11 Sanctions and Prevailing-Party Fee-Shifting Statutes After Rule 41(a)(1)(i) Notice of Dismissal*, 88 Colum. L. Rev. 1512, 1520-1525 (1988) (dismissal under Rule 41(a)(1)(i) does not bar imposition of sanctions under Rule 11). *Contra Johnson Chemical Co.* v. *Home Care Prods., Inc.*, 823 F.2d 28 (2d Cir. 1987).[7]

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motion for Rule 11 sanctions, while requiring the party seeking such sanctions to undertake the time and expense of researching, preparing, and filing a state law claim for abuse of process or malicious prosecution? Requiring the victim of a Section 1927 violation to bring a new lawsuit (complete with service of process, docketing, scheduling order, pre-trial conference, and perhaps extensive discovery) rather than allowing the judge in the original case to decide the issue is even more absurd.

[7] ATLA contends (ATLA Br. 6) that *Foss* v. *Federal Intermediate Credit Bank*, 808 F.2d 657, 660 (8th Cir. 1986),

As these courts have recognized, there is no persuasive reason for creating an exception to Rule 11 for plaintiffs who file voluntary dismissals. The attempts of petitioner and its amici to come up with such a reason are wholly inadequate. For example, petitioner's chief argument in the court of appeals and in its petition for certiorari was that, because a Rule 41(a)(1)(i) dismissal deprives the district court of jurisdiction to adjudicate the merits of the case, it necessarily also deprives the court of jurisdiction to take any other action in the case, including imposing Rule 11 sanctions for pre-dismissal conduct. In support of this proposition, petitioner relied almost exclusively upon *Johnson Chemical*. In that case, the Second Circuit held that "[o]nce [the plaintiff] had dismissed [its] action under Rule 41(a)(1)(i), the [district] court lost all jurisdiction over the action" and, accordingly, "[its] orders subsequent to the dismissal [including its order imposing Rule 11 sanctions] became a nullity." 823 F.2d at 31.

The decision in *Johnson Chemical* is wrong because it treats jurisdiction as an "all-or-nothing" principle. But as the Seventh Circuit has explained, the fact that a court has lost jurisdiction over the *merits* of a case does not necessarily mean that it loses jurisdiction over matters *collateral* to the merits:

> "Jurisdiction" is an all-purpose word denoting adjudicatory power. A court may have power to do some things but not others, and the use of

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is in accord with *Johnson Chemical*. The Eighth Circuit has since made clear, however, that *Foss* is limited to Rule 11 motions filed *after* a case is voluntarily dismissed. District courts in that circuit do not lose jurisdiction to decide Rule 11 motions that are pending *before* the dismissal. *Kurkowski*, 819 F.2d at 203 n.7.

> "lack of jurisdiction" to describe the things it may not do does not mean that the court is out of business.

Szabo, 823 F.2d at 107. Thus, while a voluntary dismissal may deprive a district court of adjudicatory power over the merits of a lawsuit, it does not render the court powerless to punish attorneys for misconduct that preceded the dismissal. See, *e.g.*, *Muthig*, 838 F.2d at 603 ("A court * * * always has jurisdiction to consider its own jurisdiction, and it has jurisdiction to punish with sanctions any abuse of its process committed during such consideration.") (citation omitted).

But for the stray holding in *Johnson Chemical*, the notion that a district court retains jurisdiction to punish attorneys who file frivolous complaints even after those complaints are dismissed would spark little debate. After all, there are an abundance of closely analogous circumstances in which a court loses jurisdiction over the merits of a claim but is free to punish those who abused the judicial process in pursuing the claim. See, *e.g.*, *Weil* v. *Markowitz*, 829 F.2d 166, 171 (D.C. Cir. 1987) (district court "retain[s] discretion to tailor Rule 11 sanctions" even after entering settlement order); *In re Ruben*, 825 F.2d 977, 981-982 (6th Cir. 1987) (district court retains jurisdiction to impose Rule 11 sanctions even after appeal has been dismissed), cert. denied, 108 S. Ct. 1108 (1988); *News-Texan, Inc.* v. *City of Garland, Texas*, 814 F.2d 216, 219 (5th Cir. 1987) (court retains power to impose Rule 11 sanctions after determining that there was no basis for removing case from state court); *McLaughlin* v. *Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986) ("it makes no difference that the District Court decided to impose the sanctions for the litigation only after the post-

judgment motions"); *Orange Production Credit Ass'n* v. *Frontline Ventures, Ltd.*, 792 F.2d 797, 801 (9th Cir. 1986) ("The fact that the district court lacked [subject matter] jurisdiction to consider the merits of the case did not preclude it from imposing [Rule 11] sanctions."); *Eash* v. *Riggins Trucking Inc.*, 757 F.2d 557, 559-560 (3d Cir. 1985) (en banc) (district court had jurisdictions to impose sanctions under either inherent power or 28 U.S.C. § 1927 even though case had been dismissed pursuant to stipulation); cf. *White* v. *New Hampshire Dep't of Employment Sec.*, 455 U.S. 445 (1982) (a request for attorney's fees under 42 U.S.C. § 1988 is not a motion to amend or alter judgment and therefore district courts retain jurisdiction to consider such requests indefinitely after judgment has been entered).

Perhaps realizing the severe weakness of its jurisdictional argument, petitioner all but abandons it in its merits brief. It now argues only that the plain language and policies of Rule 41(a)(1) mandate the the exception to Rule 11 that it advocates. Contrary to petitioner's contention, however, neither the language of Rule 41 nor its policies requires that result.

Rule 41(a)(1)(i) provides that "an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs" and that, as a general rule, "the dismissal is without prejudice." Nothing in the Rule states or even suggests that plaintiffs who file voluntary dismissals are immune from the consequences of actions they took while their cases were still pending.[8]

[8] Public Citizen contends (Pub. Cit. Br. 6) that because Rule 41(a)(1) contains explicit exceptions for Rules 23(e) and 66 as well as applicable statutes, this Court should decline to infer a Rule 11 exception. Rules 23(e) and 66 respectively provide that class actions and cases in which a receiver has been appointed may not be dismissed without the approval of the court. They thus plainly conflict with Rule 41(a)(1)'s provisions for dismissal without court approval. The drafters of the Rules therefore expressly exempted Rules 23(e) and 66 from the provisions of Rule 41(a)(1). Rule 11, by contrast, does not interfere with the right to dismiss cases without court approval. Accordingly, this Court need not infer a Rule 11 exception in order to allow both Rules to be fully enforced.

Petitioner nonetheless asserts (Br. 21-24) that the imposition of Rule 11 sanctions after a Rule 41(a)(1)(i) dismissal irreconcilably conflicts with a plaintiff's "unfettered right to dismiss," even if the Rule 11 motion was pending at the time of the dismissal. It points to two aspects of Rule 41 for this contention. First, it relies on Rule 41(a)(1)'s requirement that voluntary dismissals are "without prejudice." Second, it notes that Rule 41 denies courts the power to impose conditions on Rule 41(a)(1) dismissals. While petitioner is correct that Rule 41 guarantees that a party's first voluntary dismissal is without prejudice and can be obtained without court-imposed econditions, it is quite wrong in suggesting that when a court imposes Rule 11 sanctions for pre-dismissal conduct it interferes with either of those guarantees.

To begin with, the guarantee that voluntary dismissals may be obtained without prejudice means only one thing: if a plaintiff voluntarily dismisses a lawsuit, he will not be barred by *res judicata* principles from bringing that lawsuit at a later date. See C. Wright & A. Miller, *Federal Practice & Procedure* § 2367 (1971). Perhaps a plaintiff who is sanctioned for filing a baseless lawsuit will think twice before filing the same lawsuit a second time, but, except in

truly extraordinary circumstances, the sanction itself would not constitute a bar to doing so.[9]

Nor, of course, do Rule 11 sanctions interfere with the guarantee against court-imposed conditions on a plaintiff's right to take a voluntary dismissal. See C. Wright & A. Miller, *supra* § 2366. Rule 11 is addressed to *pre-dismissal* conduct. A court may not impose sanctions merely because a party wants to withdraw from a case. Rather, it must find that one or more of the party's prior court papers violated Rule 11. Conversely, once the court has found a Rule 11 violation, it is *required* by the language of the Rule to impose appropriate sanctions. The court has no discretion to use Rule 11 as a bargaining chip to either encourage or deter dismissals. Accordingly, post-dismissal Rule 11 proceedings stemming from pre-dismissal conduct cannot conceivably constitute a condition on the right of voluntary dismissal.

The policies of Rule 41 provide no more reason for emasculating Rule 11 than does Rule 41's plain language. Petitioner's suggestion (Br. 22-23) that attorneys with baseless or marginal complaints will refrain from voluntarily dismissing a case and instead undertake an expensive discovery process in the hope of uncovering the facts needed to fend off Rule 11 sanctions is wholly implausible. In fact, the incentive is quite the opposite: the sooner Rule 11 violators terminate their cases and stop imposing litigation costs on their opponents, the lower Rule 11 sanctions are likely to be. See *Szabo*, 823 F.2d at 1079. Moreover, assuming *arguendo* that allowing plaintiffs to escape the consequences of their conduct somehow could be seen as encouraging voluntary dismissals, there is no reason for extending this shield to plaintiffs' attorneys. It is simply unreasonable to suggest that protecting attorneys from their own Rule 11 violations will encourage plaintiffs to dismiss complaints.

Petitioner also asserts (Br. 26) that post-dismissal Rule 11 proceedings will "protract litigation, result in wasteful district court proceedings, and produce [additional] appeals," all in derogation of the efficiency goals of the Federal Rules in general and Rule 41 in particular. This argument loses the forest for the trees. No doubt if this Court creates the exception sought by petitioner, some post-dismissal proceedings will be eliminated, but these proceedings are likely to be both significantly fewer in number and substantially less burdensome in nature than the meritless lawsuits that will be filed as a result of the evisceration of Rule 11.

Petitioner finally contends (Br. 28-30) that unless the Court creates a blanket exception to Rule 11 for

[9] Petitioner points out (Br. 23) that *one* available sanction for Rule 11 violations is dismissal with prejudice. It then contends (*ibid.*) that because Rule 41(a)(1) provides that voluntary dismissals are without prejudice, courts can *never* impose Rule 11 sanctions of *any* kind after a voluntary dismissal. Because courts rarely dismiss a case with prejudice as a Rule 11 sanction (see Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1333 (1986)), it makes no sense to bar *all* Rule 11 sanctions on this ground. But even where such a sanction is imposed, it could not interfere with the Rule 41 guarantee because the bar on refiling would be a consequence of the violation of Rule 11, not of the voluntary dismissal of the claim.

voluntary dismissals, lower courts can keep jurisdiction over Rule 11 motions long after they have lost jurisdiction over the merits. It says that this is bad because a lawyer who has other matters before the same judge may be deterred from making legitimate arguments for fear that they might color the judge's view of the pending Rule 11 motion. To the extent that this chilling effect is not fanciful, it would be equally present when a Rule 11 motion is pending for a considerable period of time during an ongoing case. See generally Rule 11, Advisory Committee Note, 97 F.R.D. at 200 ("it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation"). Thus, petitioner's complaint is with Rule 11 itself, not with the use of Rule 11 after a dismissal.

In sum, neither the plain language nor the policies of Rule 41(a)(1) provide any reason for allowing litigants to evade Rule 11 sanctions simply by dismissing their cases voluntarily. To the contrary, the unambiguous language of Rule 11 and the broad purposes underlying the Rule plainly require that *all* violators of Rule 11 be subject to sanctions.[16]

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[16] Petitioner's suggestion (Br. 44 n.39) that the sanction award against it should be reversed for "plain error" on the basis of this Court's recent decision in *Pavelic & LeFlore* is without merit. Petitioner missed several available—and obvious—opportunities to raise the argument that sanctions could be imposed only against the two attorneys who actually signed the complaint. For example, even though the Fifth Circuit had established this rule in February 1987 (see *Robinson* v. *National Cash Register Co.*, 808 F.2d 1119), petitioner failed to raise the issue in either its December 1987 supplemental brief in the district court or its appeal to the D.C. Circuit. Moreover, despite this Court's grant of certiorari in *Pavelic & LeFlore* (109 S. Ct. 1116 (Feb. 21, 1989)), petitioner made no mention of the issue in its petition for certiorari six months later. It is well-settled that this Court will ordinarily not consider issues not raised below or in the petition for certiorari. See, *e.g.*, *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Nor does this case present the type of "exceptional circumstances" that might cause the Court to depart from its settled practice. See *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). Thus, this Court should not concern itself with the question of whether petitioner or the two attorneys who signed the complaint must pay the Rule 11 award.

The suggestion that petitioner did not waive this argument because it was somehow *respondents'* duty to appeal from the sanction award (Br. 44 n.39) is completely baffling. There is no reason why the *recipient* of a sanction award should appeal details of that award not contested by the sanctioned party.

II. THE CHOICE OF A STANDARD OF APPELLATE REVIEW IN RULE 11 CASES HAS NO BEARING ON THE OUTCOME OF THIS CASE AND THEREFORE PROVIDES NO BASIS FOR REVERSAL

The district court concluded that petitioner's prefiling investigation into the factual allegations of the complaint was unreasonable and therefore ran afoul of Rule 11. See Pet. App. 23a-24a. The court of appeals after reviewing the record and hearing oral argument, held that petitioner had committed two manifest Rule 11 violations: (i) failing to make any inquiry at all concerning the allegations against Hickey-Freeman; and (ii) failing to extend its in-

vestigation beyond four east coast cities notwithstanding the fact that the complaint alleged the existence of a nationwide conspiracy. *Id.* at 11a-13a. Petitioner asserts (Br. 32) that the court of appeals "appears to have evaluated" the district court's decision "under the 'abuse of discretion' standard." According to petitioner (Br. 30-31), the court should have invoked "a three-tier standard of review" under which the district court's factual findings would be subject to a clearly erroneous standard, the application of Rule 11 to those facts would be reviewed *de novo*, and the selection of the sanction imposed would be reviewed for abuse of discretion. Because, according to petitioner, the court of appeals applied the correct standard only to its review of the selection and amount of the sanction imposed, the case should be remanded for review under petitioner's trifurcated standard.

A. The Court Of Appeals Did Not Rely On An Abuse Of Discretion Standard In Affirming The District Court.

While we believe that the court of appeals could have properly deferred to the district court's discretion in this case, petitioner's argument is more fundamentally flawed. Nothing in the court of appeals' decision even remotely suggests that it applied an "abuse of discretion" standard in affirming the district court's finding of Rule 11 liability, or that the result it reached would have been any different under the standard of review that petitioner urges. To the contrary, while the court of appeals did not make explicit the standard of review it was employing, it is perfectly clear from its opinion that its finding that Rule 11 was violated did not rest on any deference to the conclusion of the district court, but instead reflected the court of appeals' own independent determination of the matter. A remand to the court of appeals therefore could not have any impact on the outcome of this case; accordingly, this Court should decline petitioner's invitation to resolve the split among the circuits over the correct standard of review and "await a day when the issue is posed less abstractly." *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Petitioner's view that the court of appeals employed an abuse of discretion standard of review in this case is based entirely on its observation (Br. 32 n.29) that the D.C. Circuit had used that standard in prior Rule 11 appeals. That may be so, but petitioner argued in its opening brief to the court of appeals (C.A. Br. 13-15) both that circuit precedent did not compel an abuse of discretion standard of review in *this* case and that "fairness to litigants and their counsel" required "a more particularized review of the factual and legal determinations comprising a Rule 11 decision than is accorded by the abuse of discretion standard." [11]

The court of appeals' statement of its reasons for affirming the district court's order suggests that it acceded to petitioner's argument. The D.C. Circuit's opinion is divided into six separate parts, one of which is headed "RULE 11 LIABILITY." Pet. App. 11a. Nowhere in that portion of its opinion does the court of appeals purport to defer to the factual findings or legal conclusions of the district court. In-

[11] Perhaps in response to petitioner's plea for "fairness," the court of appeals also allowed counsel to go well outside the record at oral argument. See C.A. Tr. 72-73.

stead, as the following excerpt from its opinion demonstrates, the court of appeals relied on petitioner's *own* description of its pre-filing inquiry and determined *de novo* that that description *compelled* a finding that Rule 11 had been violated (Pet. App. 11a) (emphasis added):

> We find no difficulty in affirming liability under Rule 11 here, as none of appellants' arguments calls into doubt the "two obvious deficiencies" that the district court identified in their pre-filing investigation of the facts: specifically, appellants failed to engage in any inquiry whatsoever concerning the allegations against [Hickey-Freeman] (as distinguished from [Hart, Schaffner & Marx]), and they claimed a nationwide conspiracy between defendants and selected merchants in each metropolitan area after polling merchants in only four eastern cities. [*Petitioner's*] *account of their efforts does no more than confirm those shortcomings;* * * * *It is impossible to see how "no inquiry" could be a "reasonable inquiry" with regard to the* [*Hickey-Freeman*] *allegation or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere.*

The court of appeals next (Pet. App. 11a-12a) considered and rejected petitioner's argument that, under the circumstances of this case, it should have been excused from making any further inquiry into its exclusive dealer allegations. Again, however, there is no indication that the appellate court's decision in any way resulted from deference to the district court's rejection of those arguments. Moreover, as if to illustrate the point that petitioner's affidavits

alone required a finding of a Rule 11 violation, the court found no need to consider that portion of the district court's order holding that petitioner's failure to conduct any inquiry into the alleged anticompetitive effects of respondents' supposed distribution practices was unreasonable. In language that, if anything, indicates that the D.C. Circuit engaged in the type of appellate review to which petitioner asserts it is entitled, the court of appeals noted that "[s]ince the district court applied the correct legal standard and offered substantial justification for its finding of a Rule 11 violation in other respects that go to the heart of the complaint, it is unnecessary for us to go further." Pet. App. 13a.

Further evidence that petitioner is wrong in arguing that the court of appeals' decision on Rule 11 liability was premised on review for abuse of discretion may be found in the section of the court's opinion addressing the amount of the Rule 11 sanction. Pet. App. 13a-14a. There, as petitioner concedes (Br. 31) was correct, the court of appeals deferred explicitly to the discretion of the district court.[12] Pet. App. 13a. No similar statement of deference was made in the liability portion of the court's opinion because the court in fact took a closer look at that district court determination than would be called for under an abuse of discretion analysis.

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[12] Petitioner's argument (Br. 38-39) that the case should be remanded so the court of appeals can determine again whether the amount of the sanction was an abuse of the district court's discretion is wholly out of place here. That issue —as opposed to issues concerning petitioner's liability—is not arguably related to any question that this Court agreed to decide. In fact, petitioner sought but did not obtain review of whether "the amount of sanctions awarded was so excessive as to constitute an abuse of discretion." Pet. (i).

In sum, petitioner has utterly failed to demonstrate that an abuse of discretion standard was in fact employed here or that the choice of a standard of review could possibly affect the outcome of this case.

B. In The Alternative, This Court Should Hold That Rule 11 Cases Should Be Reviewed Only For Abuse Of Discretion.

The circuits have split concerning the appropriate standard of review in Rule 11 cases. The overwhelming majority apply an abuse of discretion standard to the district court's determination of the facts, whether those facts constitute a violation of Rule 11, and what sanction is appropriate.[13] Petitioner, however, urges this Court to endorse the trifurcated system of review adopted by the Eighth and Ninth Circuits, in which the district court's findings of "fact" are reviewed under the clearly erroneous standard, its conclusions of "law" are reviewed *de novo*, and its determination of the appropriate sanction is reviewed for abuse of discretion.[14] If this Court concludes that

[13] See *Kale* v. *Combined Insurance Co.*, 861 F.2d 746, 756-758 (1st Cir. 1988); *Teamsters Local No. 430* v. *Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir.), cert. denied, 109 S. Ct. 128 (1988); *Stevens* v. *Lawyers Mutual Liability Insurance Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986); *Thomas* v. *Capital Security Services, Inc.*, 836 F.2d 866, 871-873 (5th Cir. 1988) (en banc); *Century Products, Inc.* v. *Sutter*, 837 F.2d 247, 250 (6th Cir. 1988); *Mars Steel Corp.* v. *Continental Bank N.A.*, 880 F.2d 928, 933 (7th Cir. 1989) (en banc); *Adamson* v. *Bowen*, 855 F.2d 668, 673 (10th Cir. 1988); *Donaldson* v. *Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987); *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168, 1174-1175 (D.C. Cir. 1985).

[14] *Kurkowski* v. *Volcker*, 819 F.2d 201, 203 n.8 (8th Cir. 1987); *Zaldivar* v. *City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986).

it is appropriate to resolve that conflict in this case, it is clear that the recent decision in *Pierce* v. *Underwood*, 108 S. Ct. 2541 (1988), compels the adoption of the abuse of discretion standard. See *Adamson* v. *Bowen*, 855 F.2d 668, 673 n.7 (10th Cir. 1988) ("Many of the reasons advanced by the court in [*Underwood*] are generally persuasive in the Rule 11 context."); *Mars Steel*, 880 F.2d at 934 ("Although we think that deferential review is appropriate for the reasons we have given, *Pierce* v. *Underwood* [citation omitted] would provide a powerful impetus toward that conclusion even if we were otherwise disposed."). As the Court noted in *Underwood*, "[i]t is especially common for issues involving what can broadly be labeled 'supervision of litigation,' which is the sort of issue presented here, to be given abuse-of-discretion review." 108 S. Ct. at 2546 n.1.

In *Underwood*, this Court concluded that awards of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(b),(d), should be reviewed under the abuse of discretion standard because the district courts are "better positioned" than the courts of appeals to conduct the necessary inquiry. 108 S. Ct. at 2547.[15] The same holds true in Rule 11 cases. From its observation of and participation in settlement conferences and other pretrial activities, the district court often will have insights into factors rel-

[15] The EAJA permits the recovery of attorney's fees against the federal government if the district court determines that the government's litigation position was not "substantially justified." In *Underwood*, this Court defined "substantially justified" as entailing a determination of whether the government's position "ha[d] a reasonable basis in law and fact" (108 S. Ct. at 2550 n.2)—a determination strikingly similar to that of whether an attorney complied with Rule 11 by making a "reasonable inquiry" (Fed. R. Civ. P. 11) "into both the facts and the law." 97 F.R.D. at 198.

evant to the Rule 11 inquiry that are simply "not conveyed by the record." *Underwood*, 108 S. Ct. at 2547. For example, the determination of whether "counsel did enough investigation before filing depends on the context" of a given case. *Mars Steel*, 880 F.2d at 934. Consequently, the district court is best suited to determining whether an attorney's conduct was "reasonable[] under the circumstances." 97 F.R.D. at 198.

Moreover, *de novo* appellate review of mixed questions of fact and law, such as whether an attorney made a sufficient investigation before filing a complaint, would drain appellate resources without benefiting litigants in other cases. Like determinations of whether the government's position was "substantially justified," Rule 11 cases "involve multifarious, fleeting, special, narrow facts that utterly resist generalization" (*Underwood*, 108 S. Ct. at 2548 (quotation omitted)) by appellate courts. Each Rule 11 case is unique—it involves specific conduct under a particular set of circumstances—and what may be a "reasonable inquiry" in one situation may not be in another. See 97 F.R.D. at 198-199. In such contexts, contrary to petitioner's assertions (Br. 32-34), "the role of appellate courts in establishing and articulating rules of law is not at stake." *Mars Steel*, 880 F.2d at 933.[16]

[16] Petitioner attempts to distinguish *Underwood* by arguing that uniformity is necessary in the Rule 11 context because Rule 11 decisions have been inconsistent and have therefore "chilled" advocacy (Br. 32-35, 40-42; see also Pub. Cit. Br. 12-14). But petitioner fails even to address *Underwood*'s recognition that uniformity imposed by appellate decisions is not possible in some contexts or to provide any reason why Rule 11 cases are more susceptible to it than are EAJA cases. In any event, petitioner has not explained why uniformity cannot be achieved through an abuse of discretion standard. To the contrary, Public Citizen concedes (Pub. Cit. Br. 12) that, under any standard, "the court of appeals [may] give the benefit of the doubt to a trial judge in a close case." The only cases that remain are those in which a clear error was made or into which the district court injected its "animosit[y]" (Pub. Cit. Br. 13) or its "personal views." Pet. Br. 35. There is no reason why an appellate court could not correct these errors or indiscretions under an abuse of discretion standard or why district courts would not be deterred from considering inappropriate factors under that standard. See, *e.g.*, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971) (abuse of discretion standard requires the reviewing court to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment").

Finally, as in *Underwood*, abuse-of-discretion review would "implement [this Court's] view that a 'request for attorney's fees should not result in a second major litigation.'" 108 S. Ct. at 2549 (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)). See also 97 F.R.D. at 201 (warning that Rule 11 should be applied so as to "assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of litigation over the imposition of sanctions"). The "complexity of the three-tiered standard creates additional work for district courts and additional issues for appeal." *Thomas*, 836 F.2d at 873. By contrast, the abuse of discretion standard—as applied in appeals of both the grant *and denial* of sanction motions—would limit the expense of satellite litigation while still permitting the courts of appeals to correct salient legal errors or indiscretions.

III. RULE 11 SANCTIONS PROPERLY INCLUDE FEES REASONABLY INCURRED IN DEFENDING THE AWARD ON APPEAL

This is a case in which petitioner brought a frivolous lawsuit, leading to the imposition of Rule 11

sanctions in the form of respondents' reasonable attorney's fees. Those fees included not only the costs incurred in defending against the frivolous suit, but also those incurred in obtaining sanctions in the district court. Petitioner then decided to appeal the award of sanctions, thereby placing respondents in the position of having to choose between incurring substantial additional attorney's fees or foregoing defense of the award in their favor. Although the court of appeals did not find petitioner's appeal to be frivolous, it did find the appeal to be meritless. Accordingly, it affirmed the award of district court fees and in addition directed that the district court award under Rule 11 additional sums to cover respondents' reasonable appellate fees.[17]

Petitioner then successfully sought review in this Court. The result has been further to multiply respondents' costs arising out of the inadequately investigated and baseless action that petitioner improperly brought more than six years ago. We do not here impugn petitioner's right to exhaust its appellate remedies; but the question remains whether respondents should bear the costs of petitioner's efforts in the event they prove to be—as they have thus far—non-meritorious. As we now show, the language and policies of Rule 11 support the court of appeals' holding that respondents' appellate attorney's fees

[17] The remand for an award of appellate attorney's fees is consistent with decisions of the First and Seventh Circuits, see *Muthig*, 838 F.2d at 607, and *Hays* v. *Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988), and contrary to decisions of the Fourth and Ninth Circuits, see *Basch* v. *Westinghouse Elec. Corp.*, 777 F.2d 165, 175 (4th Cir. 1985), cert. denied, 476 U.S. 1108 (1986), and *Orange Production Credit Ass'n* v. *Frontline Ventures Ltd.*, 801 F.2d 1581 (9th Cir. 1986).

are within the ambit of the sanctions authorized by the Rule.

A. Respondents' Appellate Fees Were Incurred "Because Of" Petitioner's Misconduct And Are Therefore A Proper Part Of Rule 11 Sanctions.

The inquiry into the recovery of reasonable appellate fees under Rule 11 must begin with the language of the Rule. See *Pavelic & LeFlore*, slip op. at 3. The last sentence of Rule 11 describes the allowable scope of the sanction as embracing the amount of expenses, including attorney's fees, "incurred *because of* the filing" (emphasis added). The question is whether respondents' appellate fees, which resulted from petitioner's appeal, were incurred "because of" the sanctionable filing. Certainly, it is indisputable that respondents would have incurred none of these expenses had the frivolous lawsuit not been filed. See *Muthig*, 838 F.2d at 607 ("[A] party who successfully defends a Rule 11 appeal incurs appellate expenses (including attorney's fees) 'because of' the Rule 11 violation."); *Borowski* v. *DePuy, Inc.*, 876 F.2d 1339, 1342 (7th Cir. 1989) ("Under [Rule 11's] make-whole policy, it is * * * appropriate to award all fees incurred *as a result of* the initial frivolous position, including fees for litigating the amount of fees to be awarded, without a separate independent finding of frivolousness at each stage of the proceedings such as a court of appeals is required to make prior to awarding fees under FRAP 38 (for a frivolous appeal).") (emphasis added). Accordingly, unless there was some intervening event that broke the chain of causation, Rule 11 would plainly appear to authorize imposition of appellate fees as part of the sanction it provides.

Petitioner makes no effort to argue that the decision of the court of appeals on appellate fees is con-

trary to the language of Rule 11. Amicus Chicago Council of Lawyers suggests (CCL Br. 38), however, that the chain of causation was broken here by Hartmarx's sanction motion or by the district court's decision to impose Rule 11 sanctions. Had sanctions not been imposed, respondents would not have incurred expenses defending them; therefore, the argument runs, fees incurred in litigating the issue of sanctions are not incurred "because of" the sanctionable filing. To begin with, this position has been uniformly rejected in the context of district court proceedings, even by those courts that deny appellate fee-shifting. See, *e.g.*, *Basch*, 777 F.2d at 174. And, of course, the causal nexus between sanctionable misconduct and appellate fees in defending an award of sanctions is identical to that between the misconduct and district court fees in securing sanctions in the first place. In any event, under the "traditional tort concepts" that CCL asserts should govern the causation issue (CCL Br. 38), the chain of causation is broken only if an intervening event is not foreseeable. See generally 4 F. Harper, F. James & O. Gray, *The Law of Torts*, § 20.5. It cannot seriously be contended that the district court's decision to impose sanctions as a result of a Rule 11 violation is not "foreseeable"; in fact, the Rule *requires* that result.

Several of petitioner's amici urge reversal on the ground that "Rule 11 applies exclusively to district court proceedings." ATLA Br. 17; see also CCL Br. 38-39; Pub. Cit. Br. 16. But that uncontroversial proposition does not support their conclusion. This is not a matter of imposing sanctions for petitioner's conduct in the court of appeals; it is a matter of delineating the scope of the sanctions attaching to its misconduct *in the district court*. Thus, the D.C. Circuit did not apply the standards of Rule 11 to any

papers filed with it; in fact, it specifically disclaimed authority to "award fees under Rule 11." Pet. App. 16a. The court of appeals "merely reaffirm[ed] that the district court's award under Rule 11 of expenses 'incurred because of' the unfounded filing should include appellate expenses reasonably incurred in defense of that award." *Ibid.* Accordingly, the court remanded the case so that the district court could "enter an appropriate award." *Ibid.* In defining the scope of permissible Rule 11 fee awards, the appellate court no more applied the rule to appellate proceedings than it does when it defines the type of conduct that is subject to Rule 11 sanctions. See, *e.g.*, *Eastway Constr. Corp.* v. *City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (reversing denial of sanctions and ordering the district court to impose sanctions).[18]

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[18] ATLA maintains (ATLA Br. 21-23) that requiring violators to pay the victim's appellate expenses would exceed the rulemaking authority delegated to the judiciary in the Rules Enabling Act, 28 U.S.C. § 2072. This Court should "decline to consider this argument since it was not raised by either of the parties here or below." *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). In any event, the argument is wholly without merit. The increased sanctioning power conferred by amended Rule 11 was deemed necessary to "discourage [the] dilatory or abusive tactics" that plagued federal practice and "to streamline the litigation process by lessening frivolous claims or defenses." 97 F.R.D. at 198. As this Court has consistently held, "Rules which incidentally affect litigants' substantive rights do not violate [the Rules Enabling Act] if reasonably necessary to maintain the integrity of that system of rules." *Burlington Northern R. Co.* v. *Woods*, 480 U.S. 1, 5 (1987). See also *Marek* v. *Chesny*, 473 U.S. 1, 36-37 (1985) (Brennan, J., dissenting) ("[T]hose provisions of the Federal Rules that explicitly authorize * * * the assessment of fees against parties whose *unreasonable* conduct has violated the rules of litigation fall[] comfortably

Nor is there any merit to the suggestion (Pet. Br. 42; CCL Br. 32; PELA Br. 11; ATLA Br. 15-18; Pub. Cit. Br. 16-17) that Rule 11 cannot reach appellate fees because they are covered exclusively by Fed. R. App. P. 38, which authorizes awards of appellate fees only for frivolous appeals. The patent flaw in this argument is that the two provisions are addressed to different conduct. Civil Rule 11 speaks to the consequences attaching to misconduct in the district court; Appellate Rule 38 covers misconduct in the courts of appeals.[19] If a party or lawyer has not engaged in sanctionable misconduct in the trial court but takes a frivolous appeal, Rule 38 is the exclusive remedy provided by the procedural rules. Conversely, a nonfrivolous but unsuccessful appeal from sanctions imposed by the district court, such as in this case, raises an issue only under Rule 11.

True, when there is a frivolous appeal from an award of sanctions, the decision of the court of appeals means that the appellee's attorney's fees would be recoverable under both Rule 11 and Rule 38. But

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into the courts' authority to administer 'remedy and redress for disregard or infraction' of those rules.") (quoting *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14 (1941)) (emphasis in original).

[19] Rule 38 seeks to "penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and expense of defending the district court's judgment." *Burlington Northern*, 480 U.S. at 7. "It is * * * for the court of appeals, not the district court, to decide whether Rule 38 costs and damages should be allowed in any given case." *In re American President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir. 1985). By contrast, Rule 11 fee-shifting is strictly a district court affair. The district court makes the initial determination to invoke the fee-shifting provisions of the Rule, determines the amount of the initial award, and sets the amount of a reasonable appellate attorney's fee.

there is nothing incongruous in this, for Rule 38 does not purport to be the exclusive source of fee-shifting authority, and it is not unusual for there to be two or more bases for shifting fees. See, *e.g.*, *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 767 (1980) (recognizing that the same conduct could give rise to fee-shifting under either Fed. R. Civ. P. 37 or the court's inherent power). In fact, as the Advisory Committee's Notes make clear, Rule 38 was specifically intended to complement another source of authority to shift fees incurred on appeal (28 U.S.C. § 1912). See 28 U.S.C. App., at 492-493. See also ATLA Br. 20 (noting the "existence of no less than six separate powers under which appellate misconduct can appropriately be sanctioned").

Thus, the mere existence of Rule 38 does not preclude district courts from including appellate attorney's fees in Rule 11 awards. Nor does Rule 11 prevent Rule 38 from achieving its stated punitive and compensatory objectives where the appeal itself is frivolous. In sum, it is no more reasonable to suggest, as petitioner does, that the partial overlap between the two rules makes appellate fees recoverable *only* when Rule 38 applies than it is to suggest that appellate fees should be available under Rule 38 *only* when there was a Rule 11 violation in the district court.[20]

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[20] In *Burlington Northern R. Co.* v. *Woods*, *supra*, an Alabama statute provided for a mandatory penalty in unsuccessful appeals from money judgments that had been stayed pending appeal. The Court held that the statute conflicted with Rule 38 in federal diversity actions because "the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation." 480 U.S. at 7. As demonstrated above, however, Appellate Rule 38 and Civil Rule 11 serve entirely different purposes. There is no

The correctness of the court of appeals' interpretation of Rule 11 is confirmed by the consistent practice in the case of other fee-shifting provisions. Almost without exception, these other statutes have been construed to cover both appellate fees and fees incurred in the fee-shifting part of the litigation. See, *e.g.*, *In re Pine*, 705 F.2d 936, 939 (7th Cir. 1983) (Truth-in-Lending Act); *Gagne* v. *Maher*, 594 F.2d 336, 344 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980) (42 U.S.C. § 1988); *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), aff'd, 465 U.S. 752 (1984) (Clayton Act). And, while petitioner correctly points out (Br. 42) that Rule 11 does not expressly "speak to the issue of further fees on appeal," neither do other fee shifting provisions that have been interpreted to reach appellate fees. See, *e.g.*, 15 U.S.C. § 1640(a)(3); 42 U.S.C. § 1988; 15 U.S.C. § 15. Nevertheless, as Judge Posner has noted, "a uniform body of law has grown up about [fee-shifting] statutes entitling a party who successfully invokes the statute to obtain reasonable fees incurred in obtaining the statutory fees, plus reasonable fees in defending the award on appeal. There is no reason to complicate this body of law by making an exception for Rule 11 fee-shifting." *Hays*, 847 F.2d at 419 (citation omitted).[21]

"indicat[ion]" that Rule 38 "occupies" Rule 11's "field of operation," any more than when some other fee-shifting provision is interpreted to allow for the recovery of appellate fees.

[21] The lone exception that we have located involves a split among the circuits over the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Compare, *e.g.*, *Trichilo* v. *Secretary of Health and Human Services*, 823 F.2d 702 (2d Cir. 1987)

B. The Court Of Appeals' Ruling Regarding Appellate Fees Is Wholly Consistent With The Policies Underlying Rule 11 And With Principles Of Sound Judicial Administration.

Petitioner and its amici suggest that as a matter of policy those who have been sanctioned under Rule 11 should not be discouraged from taking non-frivolous appeals challenging those sanctions, and that Rule 11 accordingly should not embrace appellate fees among its sanctions. Pet. Br. 43-44; CCL Br. 47-48; PELA Br. 10-11; ATLA Br. 24-25; Pub. Cit. Br. 17-20. These arguments, of course, speak more to what should be done than to what has been done and are thus more appropriately addressed to the drafters of the Rule than to its interpreters. See *Pavelic & LeFlore*, slip op. at 6 (noting that the Court's "task is to apply the text, not to improve upon it"). In any event, policy considerations fully support the ruling below.

Appellate fee awards are entirely consistent with the objectives of Rule 11. The Rule is designed to "discourage dilatory or abusive tactics and * * * [to] lessen[] frivolous claims or defenses." 97 F.R.D. at 198. See also *National Hockey League* v.

(appellate fees should be shifted), with, *e.g.*, *Cornella* v. *Schweiker*, 741 F.2d 170 (8th Cir. 1984) (appellate fees should not be shifted unless the conduct at the appellate level violated the Act). (There is a petition for certiorari currently pending in a case presenting this question under EAJA. See *Commissioner* v. *Jean*, No. 89-601, petition filed October 1989.) Appellate fee-shifting pursuant to the EAJA presents sovereign immunity concerns not inherent in Rule 11 or other fee-shifting measures.

Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (general deterrence is a major purpose of the sanctioning provisions of the Federal Rules). This deterrent goal is clearly enhanced by the rule that violators can be required to bear the full costs of unsuccessful appeals of sanction awards. "The best way to control unjustified tactics in litigation is to ensure that those who create costs also bear them." *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985). See also *Mickwee* v. *Hsu*, 753 F.2d 770 (9th Cir. 1985) (per curiam) ("When the trial court has imposed sanctions for failure to comply with discovery and the order is appealed, as a general rule attorney's fees should be awarded where the discovery order is upheld. Failure to award attorney's fees in such instances would substantially diminish the value of the award made in the trial court and thus frustrate the purpose of [Rule] 37."); Note, *The Dynamics of Rule 11*, 61 N.Y.U.L. Rev. 300, 331-332 (1986) ("The Rule 11 violator must be held accountable for the costs * * * of ascertaining the damages sustained by his Rule 11 violation.").

In addition to enhancing the Rule's overall deterrent force, appellate fee awards are necessary to preserve the credibility of the deterrence created by the original sanction award. Most Rule 11 awards are small relative to the cost of defending them on appeal. See Nelken, 74 Geo. L.J. at 1333 n.129. As a result, common sense suggests that many victims will opt either not to defend the award vigorously on appeal or not to defend it at all. See, *e.g.*, *Mars Steel*, 880 F.2d at 939 ("Pyrrhic victories are the stuff of history but hardly balm for legal wounds"); *Westmoreland*, 770 F.2d at 1179 ("[i]t is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many [victims] * * * to conclude that the vindication of the Rule 11 interest is not worth the candle"). In such cases, the Rule's deterrent effect would be undermined by a perceived ability to evade sanctions through an unopposed appeal. To be sure, the specific party let off the hook might occasionally be sufficiently "chastened" by the whole affair to stop abusing the judicial process. *National Hockey League*, 427 U.S. at 642. But "other parties to other lawsuits would [then] feel freer than * * * [the rule] contemplates they should feel to [engage in the proscribed conduct]." *Id.* at 643. In sum, it would severely undercut the force of Rule 11 were this Court to hold that the Rule cannot be invoked to require violators to bear the costs of appellate expenses that they create for others.

Petitioner is thus left to argue (Br. 43-44) that appellate fee awards will have a "chilling" effect on the willingness of attorneys to appeal from Rule 11 sanctions. But petitioner was not discouraged from taking its appeal in this case, notwithstanding the fact that the D.C. Circuit had previously held that appellate fees would be available to parties who were the victims of Rule 11 violations. See Pet. App. 16a. Nor do the First and Seventh Circuits, which have the same rule, suffer from an absence of Rule 11 appeals.[22]

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[22] See, *e.g.*, *Ballard's Service Center, Inc.* v. *Transue*, 865 F.2d 447 (1st Cir. 1989); *Kale* v. *Combined Ins. Co. of America*, 861 F.2d 746 (1st Cir. 1988); *Triad Associates, Inc.* v. *Chicago Housing Authority*, 1989 WL 154822 (7th Cir. Dec. 26, 1989); *Margulis* v. *CHS Acquisition Corp.*, 889 F.2d 122 (7th Cir. 1989); *Teamsters Local No. 579* v. *B&M Transit, Inc.*, 882 F.2d 274 (7th Cir. 1989).

Where the district court has made a clear error, it is reasonable to assume that an appeal will be filed despite the risk of appellate fee-shifting simply because the chance for reversal is high. At its core, then, petitioner's complaint is that those who are subject to fee awards in the district court will be encouraged to take a hard look at the likelihood of prevailing on appeal and may choose not to appeal in doubtful cases. Surely the loss of that sort of marginal appeal should not be lamented. To the contrary, this Court has repeatedly underscored the low social utility of attorney's fee litigation. See, *e.g.*, *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983) (warning that "[a] request for attorney's fees should not result in a second major litigation"); *Pennsylvania* v. *Delaware Valley Citizens' Council*, 483 U.S. 711, 730 (1987) (opinion of White, J.) ("[w]e have alluded to the * * * burdensome nature of fee litigation").

But even if meritorious sanction appeals would be discouraged to some extent by the threat of additional fee awards, that discouragement is amply offset by the Rule's purpose of deterring abusive litigation and lessening the burden on the judicial system. In *Bankers Life & Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645 (1988), this Court upheld against an equal protection challenge a Mississippi statute designed to deter frivolous appeals by assessing a mandatory penalty of 15% of the judgment against the appellant whenever a lower court's monetary award was affirmed without modification. This scheme was permissible even though "Mississippi may not have succeeded in eliminating all danger of deterring meritorious claims." *Id.* at 1644. Rule 11 reflects a similar—and equally acceptable—policy judgment.

In the same vein are arguments by petitioner's amici to the effect that the decision below is "manifestly unfair" to those who violate Rule 11 (ATLA Br. 24) or that "there is no general rule that [a] party's trial-court award must be protected against erosion by the expense of attorneys' fees in defending an appeal" (CCL Br. 30). The short—and dispositive—answer to these arguments is that Rule 11 was expressly designed to enable district courts to shift the cost of abusive litigation to the wrongdoer. It therefore alters the "general rule" that parties must bear their own litigation expenses. See Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 25 col. 2-3 (Rule 11 "alters the traditional American approach to costs and brings it closer to the British system."). Nor is this result unfair, because "[e]lemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen* v. *City of Independence*, 445 U.S. 622, 654 (1980). In any event, to the extent that that result is perceived by some to be "unfair," their complaint is with the Rule itself.

Finally, ATLA overstates the issue actually presented here when it suggests (ATLA Br. 24) that this Court must decide whether the affirmance of *every* Rule 11 sanction necessarily carries with it an award of appellate fees. No one disputes that district courts have wide discretion in choosing an appropriate Rule 11 sanction and are free to impose penalties other than an award of attorney's fees. Although we believe that the policies favoring appellate fees discussed above are valid in the context of an appeal from Rule 11 sanctions other than awards of attorney's fees, perhaps there is a colorable argument that non-attorney's fee sanctions should be treated differ-

ently. But the district court in this case explicitly invoked the fee-shifting provision of Rule 11 (Pet. App. 28a), thereby concluding that a full award of respondents' reasonable attorney's fees was an appropriate sanction for petitioner's misconduct. There is thus no reason to depart here from the standard practice of allowing the recovery of expenses incurred in defending an attorney's fee award on appeal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 89-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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IN THE

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OCTOBER TERM, 1989

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COOTER & GELL,
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v.

HARTMARX CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

SUMMARY OF THE ARGUMENT

The ultimate irony in the instant case is readily apparent: Petitioner is a law firm that was sanctioned for trying to represent a small corporate entity involved in litigation against major clothing manufacturers represented by a large law firm with infinitely greater resources, and sanctions were imposed after Petitioner extended the exceptional courtesy to Respondents of providing them with a preview of the class action complaint before filing it.[1] Despite the fact that Petitioner's coun-

[1] Petitioner's counsel provided Respondents' in-house and outside counsel with copies of the Complaint before filing and invited both sets of counsel to take as much time as they needed to examine the complaint and reply to Petitioner before any lawsuit was filed. Brief for Petitioner, at 14.

sel agreed to give Respondents as much time as they needed to reply to Petitioner before the class action complaint was filed, Respondents invited Petitioner to file the Complaint and only then came forward with a claim that Petitioner was in error on the facts.

At the direction of its client, Petitioner then dismissed the action before any substantive rulings had occurred or an answer or motion for summary judgment had been filed, only to find that it is now being charged with in excess of $20,000 in legal fees for Respondents' counsel for the District Court phase alone, to be followed by what will in all probability be substantially larger fees for the appeal and most likely even greater amounts for certiorari review if Respondents prevail here. And all of this occurred with no adjudication of liability in Respondents' favor and with an appellate court review that gave extraordinary deference to a district judge who never heard the case on the merits and waited nearly four years before ruling.

Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure contemplates that a plaintiff may decide, prior to a defendant's actually answering a complaint or moving for summary judgment, to terminate an action *without prejudice*. The rule encourages litigants to reconsider early whether litigation is in their best interest and to withdraw without penalty at a time when a defendant has not been substantially burdened. To permit Rule 11 sanctions to be imposed following a voluntary dismissal will discourage litigants from availing themselves of voluntary actions, encourage defendants to file Rule 11 motions early in litigation as an *in terrorem* device to deter suits and to create a potential conflict of interest between a plaintiff and plaintiff's counsel, and force courts to entertain satellite litigation that has little to do with the merits of the dispute that gave rise to the filing of a complaint.

Much as Respondents and their *amicus* Washington Legal Foundation ("WLF") try to portray Petitioner

and its *amici* as "anti-Rule 11," that is not the case. They recognize the need for the Rule, but, unlike Respondents and WLF, they also recognize that the Rules of Civil and Appellate Procedure embody other values beyond sanctioning attorneys for what a district judge finds, with the benefit of 20-20 hindsight, to be inadequate performance. It is this insensitivity to these other interests that pervades Respondents' brief and the rulings below and that forms the core reason requiring reversal on all three issues.

This case demonstrates the need for careful appellate review of the legal rules that district judges adopt and apply in the course of deciding upon Rule 11 sanctions. Here, Respondents have been unable in the District Court, in the Court of Appeals, and in this Court to demonstrate a single reason why Petitioner should be deemed responsible for expenses incurred by Respondents in moving to dismiss a Complaint, after Respondents invited Petitioner to file the Complaint and declined to discuss it before it was filed.

Finally, the many briefs filed with the Court conclusively demonstrate that there is no reason to believe that this Court intended Rule 11 to override Federal Rule of Appellate Procedure 38 or 28 U.S.C. § 1912. The appellate rule and statute are directly on point, and Respondents' argument for virtually automatic Rule 11 sanctions on appeal is an invitation to deter legitimate appeals for no good reason.

In *Pavelic & Le Flore v. Marvel Entertainment Group*, —— U.S. ——, 110 S.Ct. 456 (1989), this Court held that Rule 11 sanctions may be imposed only on the individual attorney signing the pleading, not the law firm. Although the award of sanctions against Petitioner constitutes plain error under *Pavelic*, the issues which the Court has agreed to review are substantial and should be decided to give Petitioner and the federal bar guidance on the interrelationship of Rules 11 and 41, the scope of appellate review, and the availability of automatic sanc-

tions on appeal. *See generally, Sibbach v. Wilson*, 312 U.S. 1, 16 (1940) (plain error).

ARGUMENT

I. THE GOALS OF RULES 11 AND 41 ARE BEST SERVED BY ALLOWING THE UNFETTERED RIGHT TO DISMISS UNDER RULE 41(a)(1)(i)

The facts of this case demonstrate why the legitimate interests of both plaintiffs and defendants are furthered by a holding that sanctions may not be imposed under Rule 11 following a voluntary dismissal under Rule 41(a)(1)(i). The goal of the Federal Rules of Civil Procedure is "to secure the just, speedy and inexpensive determination of every action." Fed.R.Civ.P. 1. This goal is best achieved if the parties or potential parties are encouraged to discuss disputes informally, to avoid unnecessary filing of lawsuits, and to reduce litigation costs. This is exactly what Petitioner tried to do and what Respondents tried to avoid.

Had Respondents called to Petitioner's attention any facts they believed negated the antitrust allegations in Petitioner's draft Complaint, they would have reason to complain of a failure on Petitioner's part to investigate those facts. But, Respondents chose not to disclose any of their factual claims during the unlimited time they had to review the draft Complaint and withheld their assertions until they filed their Motion to Dismiss and Rule 11 Motion. Such behavior is totally inconsistent with the goals of the Federal Rules of Civil Procedure and smacks of game-playing and tactical maneuvering.

What Respondents refuse to admit is obvious: When a defendant is given an opportunity, at little or no cost, to suggest to a plaintiff that the factual allegations in a complaint are in error, the earlier the defendant does so, the less likely it is that the defendant will bear any substantial costs if the plaintiff has made a mistake. A correlative point is equally obvious: if the plaintiff has provided the defendant with a copy of the complaint before it is filed, the defendant has a chance to avoid all litigation by pointing out deficiencies in the complaint before it is filed, and if the plaintiff heeds the warning of the defendant, the defendant will escape all of the costs which litigation inevitably entails; if the plaintiff refuses to heed the warning, the plaintiff will be charged with the resulting costs if the complaint violates Rule 11.

As Petitioner has argued in its opening brief, the purpose of Rule 41(a)(1)(i) is to permit a plaintiff to walk away from a case, without penalty, prior to the time that a defendant has been substantially burdened. If Petitioner's argument is accepted, defendants will be encouraged to discuss, voluntarily and informally, the allegations of a complaint, which will further voluntary dismissals before a defendant is burdened with the costs of filing an answer or a motion for summary judgment.[2] Petitioner's reading of the rules would reduce the costs of litigation for plaintiffs and defendants and remove the burden from overworked courts of ruling on unnecessary motions, including motions for sanctions.[3]

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[2] The Washington Legal Foundation argues as *amicus curiae* that, because Respondents filed affidavits with their motion to dismiss, that motion should be treated as one for summary judgment whose filing would preclude a dismissal without prejudice. It is clear, however, that Respondents chose not to label the motion as one for summary judgment, nor have they ever argued that it was one, and the district court did not treat the motion as seeking summary judgment. Moreover, Respondents' motion would have been defective on its face as a summary judgment motion for failure to include a Statement of Material Facts as to Which There is No Genuine Issue, as required by Local Rule 108(h). Furthermore, an actual summary judgment motion would have given Petitioner the right to seek discovery of Respondents before responding to the motion pursuant to Rule 56(f). Petitioner never had the benefit of discovery prior to voluntary dismissal in this case. These important practical differences underscore the rationale for the differing treatment under Rule 41(a)(1) of Rule 12 motions to dismiss and Rule 56 motions for summary judgment.

[3] Respondents erroneously suggest that only the Second Circuit supports Petitioner's argument. Brief for Respondent, at 21. In

If, however, Respondents' argument prevails, defendants will have every incentive to refuse to cooperate, to invite plaintiffs to file complaints, and to use Rule 11 as a club to penalize plaintiffs who have good faith bases for filing suit and who cannot avail themselves of compulsory process until suit is filed. As the Brief of Plaintiff Employment Lawyers Association as Amicus Curiae, at 4-5, demonstrates, plaintiffs in many cases cannot obtain the information they need without cooperation from the defendant prior to filing suit. Respondents' reading of Rules 41 and 11 threatens plaintiffs' legitimate interests by leaving them powerless to compel information from a prospective defendant and subject to sanctions if they have been unable to intuit the information that defendants are withholding prior to the filing of a complaint.

Moreover, if Respondents' view of Rules 11 and 41 prevails, Rule 41(a)(1)(i) cannot mean what it says—*i.e.*, there is no longer any guarantee that a dismissal will be without prejudice. Respondents' Brief at 26 n.9 concedes as much. Respondents recognize that their argument is so broad that it would require the Court to hold that although a plaintiff may dismiss without prejudice pursuant to Rule 41(a)(1)(i), pursuant to Rule 11 a district court can impose the sanction of dismissal with prejudice. This reading of the rules renders Rule 41(a)(1)(i) a nullity any time that a Rule 11 motion is filed.[4]

Respondents attempt to avoid the fact that there are two explicit exceptions for other rules (23(e) and 66) in Rule 41(a)(1)(i), but not for Rule 11, by claiming that if Petitioner's position is upheld, sanctions based on 28 U.S.C. § 1927 and the bad faith exception to the American Rule on attorneys fees would also be precluded. What Respondents fail to note is that Petitioner's argument is based on an interpretation of the language of Rule 41(a)(1)(i) and its relation to other rules, which cannot, consistent with the Rules Enabling Act, 28 U.S.C. § 2072, alter the effects of statutes like § 1927 or substantive rules on attorneys' fees. Therefore, Rule 11 sanctions are disallowed here, not because of an inherent defect in the rules, but because the balance struck in Rule 41(a)(1)(i) excludes Rule 11 sanctions as a price of voluntary dismissal.

II. THE IMPOSITION OF RULE 11 SANCTIONS SHOULD BE SCRUTINIZED UNDER VARYING STANDARDS OF REVIEW, NOT SOLELY UNDER AN ABUSE OF DISCRETION STANDARD

Rule 11 sanctions not only impose financial burdens on litigants and lawyers, but they also injure the reputation of counsel who are sanctioned. On its face, Rule 11 recognizes the need not to penalize lawyers for making good faith arguments "for the extension, modification, or reversal of existing law." But Rule 11 provides no guidance as to what standard should be employed by counsel who are asked to file suits based upon factual allegations

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fact, the Eighth Circuit has also held that a district court may not impose Rule 11 sanctions after a complaint has been voluntarily dismissed, *Foss v. Federal Intermediate Credit Bank*, 808 F.2d 657, 660 (8th Cir. 1986), although that Circuit permits Rule 11 sanctions to be imposed after a voluntary dismissal if a Rule 11 motion is pending before dismissal. *Kurkowski v. Volcker*, 819 F.2d 201 (8th Cir. 1987). To that extent, Petitioner disagrees with the Eighth Circuit: either Rule 11 permits sanctions following a voluntary dismissal or it does not. It is difficult to see why the pendency of a motion should be determinative. To make the Eighth Circuit's distinction is to encourage early filing of Rule 11 motions, a practice which Petitioner urges is most undesirable.

The Fifth Circuit has reasoned that Rule 41(a)(1) means what it says and prohibits post-dismissal proceedings. But, it has done so in cases that do not involve Rule 11. *See* Brief for Petitioner at 24.

[4] As set forth in Respondents' Brief at 21, only the First, Seventh and Ninth Circuits are unqualifiedly in accord with the District of Columbia Circuit on the interrelationship between Rules 11 and 41. Not one of these courts, however, addressed the issue that Rule 11 could be used to circumvent Rule 41(a)(1)(i)'s guarantee of a dismissal without prejudice.

and beliefs of their clients. The rule provides only that counsel should certify that a "reasonable inquiry" has been made before signing a pleading and that the pleading is not filed for any improper purpose. The facts of this case demonstrate the need for appellate review of the procedures used by a district court in Rule 11 proceedings, the importance of announcing that defendants who abuse Rule 11 may not benefit from it, and the unfairness of permitting Rule 11 proceedings to be continued indefinitely and resurrected by a district court without explanation.

Prior to filing the Rule 11 motion, Respondents had absolutely no knowledge of the information possessed by Petitioner when the Complaint was filed. Before the District Court argument on the Rule 11 Motion, Petitioner filed affidavits of two attorneys working for Petitioner, including its senior partner. These affidavits clearly stated that the investigation into Respondents' practices was initiated on the basis "of information received from principals of our client," (J.A. 22) and that the clients, experienced in the men's clothing industry, informed Petitioner of Respondents' exclusive sales practices. (J.A. 25).

Moreover, the affidavit of Mr. Cooter, the senior partner, indicated that his clients had advised him that Respondents had dealt with Hart Schaffner & Marx and Hickey-Freeman suits similarly. (J.A. 25). At the time, Mr. Cooter assumed that this adequately explained Petitioner's belief that its survey with respect to Hart Schaffner & Marx suits was equally valid with respect to Hickey-Freeman suits. During oral argument before the District Court, Mr. Cooter reiterated that his clients had informed him that both lines of suits were marketed similarly and were subject to the same restraints. (J.A. 57). Because the District Court did not hold an evidentiary hearing, Mr. Cooter simply represented to the Court some of the information provided to him by his clients.

(J.A. 59). He explained Petitioner's investigation and the ways in which it corroborated the information provided by his clients, who were experienced in the industry. (J.A. 57-58).

Respondents offered no evidence to rebut Petitioner's representations, because they had none. They had declined to avail themselves of the opportunity offered by Petitioner to depose the lawyers who brought the class action Complaint. And, the District Court took no evidence. Moreover, Respondents were never able to explain how it was that some of its retailers publicly advertised that they were the exclusive dealers for Respondents' suits in their areas. (J.A. 18, 63). Respondents also have never denied that their retailers sell at relatively uniform prices or that those prices are inflated, as alleged in the Complaint. And, Respondents never challenged Petitioner's representation that it chose to dismiss its class action Complaint solely to conserve its resources for previously pending litigation, not because the Complaint lacked merit when it was filed.

The instant facts demonstrate how important it is for a court of appeals to require a district court to engage in careful fact finding as a prerequisite to imposing Rule 11 sanctions.[5] Petitioner urges that the clearly erroneous standard is the correct standard for appellate review of

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[5] The Association of Trial Lawyers of America's Amicus Curiae Brief, at 14-15, suggests that the clearly erroneous standard is not appropriate because sanctions are frequently imposed without a hearing and without fact findings. Indeed, it is difficult to ascertain from reported decisions the procedures used by most courts in Rule 11 cases. Petitioner submits, however, that a Rule 11 sanction ought to require minimal fairness, at least a minimal opportunity for a lawyer or litigant to dispute facts, and a finding based upon the evidence. If ATLA is correct—and if sanctions may be imposed in the absence of hearings, evidence and findings—it probably will not matter what standard an appellate court uses; review will be a farce, and Rule 11 will be the ultimate threat to trial lawyers.

disputed facts," and that this standard requires in the first instance that the district court make factual findings that purport to justify a Rule 11 award. As to Petitioner, the District Court made no findings on any of the essential points. It completely failed to address Petitioner's claim that its client had indicated that two lines of suits were fungible, leading any reasonable person to conclude that an investigation of one line was adequate to cover the other. The District Court also faulted Petitioner for failing to make a more extensive telephone inquiry, without making any findings as to the reasonableness of Petitioner's relying on its experienced clients, and on the fact that Respondents had been given an extension of time to review the draft Complaint and had identified not a single problem with it. In addition, the District Court made no effort to explain why Respondents should be permitted to conceal information prior to the filing of a Complaint and then suddenly to offer that information in support of a Rule 11 motion.[7]

[6] Now that this Court has held that a Rule 11 sanction is essentially a deterrent, *Pavelic & LeFlore*, 110 S.Ct. 456, it would seem that a district court ought to be required to carefully consider exactly what a lawyer did to decide whether a deterrent is required and, if so, what type of deterrent would be appropriate. A district court must reconstruct historical fact in Rule 11 proceedings in precisely the same way it must when deciding whether to grant injunctive relief, equitable remedies, or damages in a bench trial. The type of findings required by Fed. R. Civ. P 52 ought to be required in any Rule 11 proceeding in which an attorney's reputation may be at stake as well as his or her pocketbook.

[7] In *In re Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1986), the court reversed an award of sanctions pursuant to Rule 11 citing as a reason the district court's failure to "consider any misconduct on the part of defense counsel which may have contributed to the protraction of this lawsuit." In reviewing the sanctions against Petitioner, the Court of Appeals failed to consider the absence of findings as to the interaction between Petitioner and counsel for Respondents. Without any evidence to support its conclusion, the District Court simply asserted that plaintiff's counsel did not ask

Without careful fact-finding by a district court, it is impossible for a court of appeals to engage in any meaningful review. The instant case well demonstrates the importance of either *de novo* review or, at a minimum, careful abuse of discretion review[8] of the application of facts to the Rule 11 standard. Without such review, plaintiffs will be chilled from pursuing legitimate cases.

Incredibly, on the record before the Court, Respondents argue that the Court of Appeals did not rely upon an abuse of discretion standard in affirming the District Court and that there is no reason to suppose that its decision would have been different had it adopted the appellate standard proposed by Petitioner. Brief for Respondents at 30. It is true that the Court of Appeals did not explicitly defer to the factual findings or legal conclusions of the District Court. *Id.* at 31. This is because the District Court made no real findings of fact and declined to set forth any clear legal standards by

defense counsel about the factual basis for the Complaint. The District Court also failed to consider that the Respondents withheld facts regarding the draft Complaint until they filed their Motion to Dismiss and Rule 11 Motion. In fact, Petitioner represented quite the opposite, *i.e.*, the purpose for forwarding the Complaint to both in-house and outside counsel was to invite a discussion of all issues and to provide an opportunity for Respondents to offer any information that might cause Petitioner to reassess the Complaint it had drafted.

There is not one shred of evidence to suggest that Petitioner would not have further investigated any allegations made by Respondents. The record demonstrates the opposite. Once Respondents filed their affidavits, Petitioner did further investigation and discovered that Respondents' affidavits were not as convincing as they appeared on their face, and were in fact consistent with a pattern of price-fixing supported by exclusive dealing. (J.A. 20-21).

[8] The Association of Trial Lawyers of America, as amicus curiae, has argued for an abuse of discretion standard, but has urged that courts of appeals can only fulfill their appellate mandate if they make it clear that a district court abuses its discretion when it applies an incorrect legal standard. ATLA Brief at 15.

which to assess Petitioner's conduct. If the Court of Appeals had adhered to the review standard suggested by Petitioner, it is respectfully submitted that the Court of Appeals might well have reached a very different result. It certainly would have discussed and found significant the following:

> 1. That the defendant here was provided an opportunity to review the Complaint before it was filed, declined to identify what it now contends are obvious errors, and then filed a Rule 11 motion directed at the complaint.[8]
>
> 2. That the District Court imposed sanctions four years after the Rule 11 Motion was made, without identifying legitimate reasons for such an unwarranted delay and the circumstances that made the Rule 11 issue ripe long after all parties assumed it was moot.
>
> 3. That the Petitioner relied upon the expertise of its client and corroborated the client's information in deciding how extensive an investigation to conduct before filing a complaint.
>
> 4. That the District Court made factual assumptions that were unsupported by evidence and that were inconsistent with Petitioner's explanation of the factual basis for the complaint.

Petitioner respectfully submits that, had the Court of Appeals given these factors appropriate *de novo* consid-

[8] Even if a defendant is not absolutely barred from recovering Rule 11 sanctions when it has an opportunity to review a complaint before it is filed and declines to identify alleged errors, the Court of Appeals might have held that a defendant must demonstrate that any harm that it suffered from the complaint would inevitably have been incurred even if the defendant had notified the plaintiff of alleged errors before the complaint was filed. In this case, such a ruling would have precluded any sanctions, since Respondents have made no showing that the Complaint which was filed would have been in the same form had they suggested to Petitioner before the Complaint was filed the facts that were contained in affidavits filed in support of the motion to dismiss and the Rule 11 motion.

eration, it is inconceivable that it would have affirmed the decision of the District Court.

Petitioner joins in the observation of the Public Citizen Litigation Group, Brief Amicus Curiae, at 13:

> Defining the proper standard of review is not merely a question of picking among equally appropriate alternatives. Rather, the scope of review may not only determine the result of an appeal, but may sharply affect whether a sanction will be imposed in the first place. Litigation is inherently an adversarial process, in which tempers sometimes become short, lawyers occasionally overstep the grounds of civility in representing their clients zealously, and trial judges, like all human beings, develop animosities toward one party or one attorney in some cases. Rarely will the outcome on the merits be affected by such human frailties, but that cannot be said with confidence on the matter of sanctions, as indeed this case seems to suggest . . . . While no system of review can prevent all miscarriages of justice, applying a *de novo* standard will help assure that a trial judge's decision on a sanctions motion will be made for reasons that are proper under the law.

Respondents argue, Brief for Respondents, at 36, "*de novo* appellate review of mixed questions of fact and law, such as whether an attorney made a sufficient investigation before filing a complaint, would drain appellate resources without benefiting litigants in other cases." This is manifestly incorrect. Careful appellate review is not unduly burdensome if the district court makes appropriate findings and clearly identifies the legal standard it is applying. Respondents' reasoning also flies directly in the fact of this Court's articulated rationale for Rule 11, as recently set forth in *Pavelic*, *supra*. *Pavelic* reasoned that deterrence is the appropriate goal of Rule 11 sanctions. Petitioner respectfully suggests that there can be no reason for a Rule 11 sanction unless a district court, and a court of appeals on

review, can articulate a standard which has been violated and a rule to guide attorney practice. Unless this is possible, there can be no deterrence, and the use of Rule 11 is wasteful and possibly a deterrent to objectively reasonable actions by counsel fearful of after-the-fact sanctions by courts free to second-guess every move that counsel might make.[10]

If a district court makes careful findings of fact and articulates the rule of behavior which has been violated, appellate review is relatively simple: either the appellate court holds that the district court adopted a correct legal standard and correctly applied it to the facts, or the appellate court finds error in the choice of the standard or its application and reverses. Only where, as in the instant case, the district court fails to adequately find facts and completely fails to set forth the legal standard against which attorney behavior is to be assessed is *de novo* review difficult. And, in a case like the instant one, it is clear that any other type of review, including abuse of discretion review, leaves the bar without any guidance as to what an attorney is expected to do before filing a complaint when his client gives him information which is corroborated by investigation and potential defendants choose not to discuss a draft of the complaint before it is filed.

[10] Petitioner believes that the abuse of discretion standard of review adopted by this Court in *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 (1988), is not appropriate in Rule 11 cases. Rule 11 sanctions threaten not only the reputation of sanctioned lawyers, but also the availability of legal services to the community. It is of vital importance that lawyers are not sanctioned in one court for behavior that is deemed proper in another. Such disparity would undermine a lawyer's willingness to zealously pursue legitimate cases and leave counsel unable to assure equal zeal in all courts. Unlike the Equal Access to Justice Act, 28 U.S.C. § 2412(d), at issue in *Pierce*, Rule 11 is not confined to sanctions against the United States, and Rule 11 sanctions raise possibilities of discrimination against lawyers and their clients in a variety of unpopular cases.

III. FED. R. APP. P. 38 AND 28 U.S.C. § 1912 PROVIDE ADEQUATE PROTECTION TO APPELLEES IN RULE 11 SANCTIONS APPEALS

Respondents appear to concede that Petitioner's appeal to the District of Columbia Circuit and its certiorari petition posed substantial issues, and they are unable to make any coherent argument for penalizing such appeals. Indeed, there is no persuasive argument for punishing nonfrivolous appeals in the Rule 11 context, when Fed. R.App.P. 38 and 28 U.S.C. § 1912 already provide substantial protection against all frivolous appeals. The rule and statute provide not only that a court may impose costs, including attorney's fees, upon a party for taking a frivolous appeal, but also that the court may double the costs in order to deter frivolousness.

As the Amicus Curiae Brief of the Association of Trial Lawyers of America, at 18-20, points out, in addition to rule 38 and § 1912, federal courts can use 28 U.S.C. § 1927 (sanctions for attorney misconduct), their inherent power, and Fed.R.App.P. 46(c) (disciplinary action against attorneys), to punish or deter counsel who burden appellate courts with meritless appeals. There is no need to construe Rule 11 to automatically require a lawyer or litigant who has been sanctioned to pay further fees and costs to an adversary simply because a legitimate appeal has been filed.[11]

The anomaly in Respondents' argument is clear. If a suit is successfully brought against a defendant for com-

[11] There is nothing in the history of Rule 11 to suggest that it was intended to be a general provision for attorney's fees like those found in statutory schemes that give a prevailing party a right to attorney's fees, as under the Civil Rights statutes. *See, e.g.*, 42 U.S.C. § 1988. Even under § 1988, the circuits are not uniform in shifting appellate fees. *See, e.g., Munson v. Friske*, 754 F.2d 683 (7th Cir. 1985) (attorney's fees for appellate work of a prevailing defendant are not mandated by 42 U.S.C. § 1988 unless the plaintiff's appeal is frivolous, unreasonable or without foundation, even though not brought in subjective bad faith).

pensatory and even punitive damages, the defendant is entitled to appeal without penalty as long as the appeal is not frivolous. But, an attorney or litigant who is sanctioned under Rule 11 may not appeal without risking a penalty no matter how substantial the issues raised on appeal. Surely, this cannot be the reasonable intent of Rule 11 nor its most logical construction in the face of rules and statutes that on their face address under what circumstances fees are available when a party loses an appeal.[12]

Where an attorney's reputation is called into question by a Rule 11 sanction, or where an attorney or litigant is assessed a monetary sanction that could be appealed without penalty if it were treated as compensatory or punitive damages, a nonfrivolous appeal should not be penalized. Each of Respondents' arguments is an argument for general fee shifting, and none can be confined to Rule 11 cases. As various amici point out, there is nothing in the history or language of Rule 11 to suggest that it was intended to be a general fee-shifting statute, let alone that the Rules Enabling Act would authorize any such interpretation.[13]

---

[12] Petitioner has pointed out in its opening brief, at 43-44, the imbalance that Respondents' argument would produce between unsuccessful Rule 11 movants who appeal and litigants or lawyers who are sanctioned and appeal. This imbalance is also discussed in the Amicus Curiae Brief of the Association of Trial Lawyers of America, at 24-26, and the Brief Amicus Curiae of Public Citizen, at 18, but not in Respondents' Brief.

[13] Respondents seek to avoid the fact that, since the appeal was not frivolous, an award in the Court of Appeals under Rule 38 would have been improper. According to Respondents, they can receive fees for the appeal under Rule 11, although they admit that it applies only to district court proceedings, since those fees were incurred "because of" Petitioner's alleged violation of Rule 11 which, they argue, is no more than what the Rule allows. Aside from this obviously strained reading of the Rule, its one-way and unequal benefits for Rule 11 victors, and its presumed application to fees incurred in this Court, it is more than just a little bit remarkable that nowhere in the Advisory Committee Notes is there even a hint that a whole new basis for awarding attorneys' fees on appeal was tucked into those two little words. Thus, even if form were to prevail over substance, and it were proper to decide the question by focusing on the court in which the fees were awarded, rather than the one where the services were rendered, there is simply no basis in the rule or elsewhere to allow the automatic recovery of all fees expended in defending a sanctions award.

CONCLUSION

For the reasons stated in both the opening brief and in this reply, Petitioner asks the Court to reverse the judgment of the Court of Appeals and to hold that the sanctions imposed in this case were improper.[14]

---

[14] Petitioner suggests to the Court that the award of sanctions against a law firm was plain error under *Pavelic*, but that the issues which the Court has agreed to review are substantial and ought to be decided so that Petitioner and other counsel will have guidance as to the relationship of Rules 41(a)(1)(i) and 11, the scope of appellate review, and the automatic imposition of appellate sanctions. If the Court agrees with Petitioner that its voluntary dismissal barred the District Court from awarding sanctions, the *Pavelic* issue will be moot. If the Court agrees with Petitioner that an award of attorney's fees following a nonfrivolous appeal is improper, the *Pavelic* issue will be at least partially moot. And, if the Court agrees with Petitioner that the Court of Appeals used the wrong standard of review, any remand could include consideration of the question whether *Pavelic* and the plain error doctrine should preclude a sanctions award in this case.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER COOTER & GELL

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER COOTER & GELL

Pursuant to Rule 36.2 of this Court and with the written consent of the parties, the Association of Trial Lawyers of America ("ATLA") submits this brief as *amicus curiae* in support of Petitioner Cooter & Gell.

THE INTEREST OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

ATLA is a national bar association of approximately 60,000 litigators who primarily represent plaintiffs in suits for tortious

misconduct in the personal injury, civil rights and commercial fields. Rule 11 is a source of particular concern to ATLA, as the recognized representative of plaintiffs' lawyers, because sanctions under the Rule have been levied disproportionately against plaintiffs and their counsel. *See* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988); Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* 65 (Am. Judic. Soc'y 1989) ("*Third Circuit Task Force Rep't*"); *see also* Willging, *The Rule 11 Sanctioning Process* 75 (Fed. Jud. Ctr. 1988). Accordingly, ATLA has a special interest in the law developing under Rule 11 and in the issues raised by this case.

SUMMARY OF ARGUMENT

Issue No. 1. Whether jurisdiction exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i).

Rule 11 sanctions should not be imposable following a Rule 41(a)(1) voluntary dismissal for four reasons:

(a) Purpose. The expressly stated purpose of Rule 11 is deterrent, not punitive nor compensatory. The Rule, according to its drafters, is designed to "reduce frivolous claims, defenses or motions. . . ." 97 F.R.D. 190, 192 (1983). This purpose is satisfied by encouraging voluntary dismissal of claims under Rule 41(a)(1), and it is frustrated by constraining plaintiffs to continue to litigate claims in an effort to demonstrate their bona fides or merits. As a practical matter, the decision below will inhibit Rule 41(a)(1) dismissals and promote litigation in marginal cases because of plaintiffs' rational apprehension that a dismissal itself will become evidence that the dismissed claim was sanctionable.

(b) Redundancy. Plaintiffs do not start lawsuits in order to dismiss them under Rule 41(a)(1). If they do, defendants have other remedies available to them, ranging from causes of action for wrongful civil litigation to independent statutory claims. Since there is no evidence that the drafters intended to carve a

Rule 11 exception into Rule 41(a), there is no warrant, much less any need, to interpret Rule 41(a) as permitting redundant Rule 11 sanctions.

(c) Procedural Needlessness. A defendant can preserve a Rule 11 sanctions motions by the simple expedient of filing an answer. The instant case, for example, arises only because respondent consciously chose not to file a general denial together with a Rule 12(c) motion for judgment on the pleadings, electing instead to file a voluminous Rule 12(b)(6) motion. The Rule 12(b)(6) motion offered no procedural advantages over the Rule 12(c) alternative (the motions could have been substantively identical) and left the Rule 41(a)(1) dismissal route open to the plaintiff. The Rules afford defendants this choice, and the selection of the 12(b)(6) alternative in any particular case does not reflect any defect in the Rules necessitating a creative reinterpretation of Rule 41(a)(1).

(d) Piecemeal Appeals. If a Rule 41(a) dismissal does not end plaintiffs' exposure to Rule 11 sanctions, then there is no reason why entry of judgment or filing a notice of appeal should be deemed to do so, and several circuits following the lower court's approach have so ruled. An affirmance in this case therefore presents the serious risk of promoting piecemeal appeals—one appeal on the merits following judgment, a second on the post-judgment sanctions decision. At the very least, if the lower court's decision is sustained, this Court should direct that sanctions may be imposed only where, as in this case, a motion for sanctions antedates entry of judgment and only when, unlike this case, the award is rendered within a prescribed period of time (e.g., 30 to 90 days) after judgment has been entered.

Issue No. 2. Whether review of Rule 11 sanctions under an abuse-of-discretion standard is appropriate.

The circuits are split as to whether a district judge's legal determination that Rule 11 has been violated should be reviewed under the abuse-of-discretion standard or should be afforded *de novo* review. In deciding between these standards,

the Court is urged to bear in mind the principal problem posed by Rule 11 to practitioners—that, while sanctions are mandatory, the standards for imposing sanctions are highly uncertain, fluctuating from district to district and judge to judge. *See, e.g.*, ABA Section of Litigation, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 104 (1988) ("ABA Standards"). If the abuse-of-discretion standard is endorsed by this Court, it should be coupled with an admonition about the need for careful appellate review of legal issues in Rule 11 cases and an express endorsement of the familiar doctrine that the application of an incorrect legal standard in imposing a sanction constitutes an abuse of discretion *per se*.

Issue No. 3. Whether a court of appeals can automatically impose Rule 11 sanctions for an appeal upon affirmance of a Rule 11 award.

A Rule 11 attorneys' fees award should not automatically be imposed upon affirmance of a Rule 11 sanction for five reasons:

(a) Statutory Construction. Rule 11, by its terms, has no application to proceedings on appeal. It applies only to proceedings in federal district court. *See* Fed. R. Civ. P. 1, 81. Rather, Congress has enacted a sanctions statute (28 U.S.C. § 1912 ("Section 1912")) and this Court has promulgated a rule based on that statute (Fed. R. App. P. 38 ("Appellate Rule 38")) that are specifically tailored to the appellate process and govern when sanctions may appropriately issue on appeal. There is no evidence that, in adopting Rule 11, the drafters of the Rule, or this Court as ultimate promulgating authority, ever intended to displace Section 1912 or Appellate Rule 38. Under traditional rules of statutory construction, Rule 11's broad, non-specific, district-court sanctioning power cannot be read to supersede the narrow, specific, appellate sanctioning power set forth in Section 1912 and Appellate Rule 38.

(b) Redundancy. Six separate sources of power currently authorize sanctions on appeal: Section 1912, Appellate Rule 38, 28 U.S.C. § 1927 ("Section 1927"), inherent judicial power, Fed. R. App. P. 46(c) ("Appellate Rule 46(c)") and local circuit court rules. All of these powers are discretionary. All authorize sanctions only for frivolous appeals. In light of the availability of these alternate remedies, it is unnecessary to construe Rule 11—with its dramatically different standard of liability—to furnish a sanctioning power on appeal.

(c) Rules Enabling Act. Were Rule 11 construed as requiring the automatic imposition of monetary sanctions upon affirmance of a Rule 11 award, the Rule would violate the Rules Enabling Act, 28 U.S.C. § 2072, because it would encroach in an area—mandatory fee-shifting—reserved to Congress. The American Rule requiring each litigant to bear his or her own attorneys' fees "is deeply rooted in our history and in congressional policy; and it is not for [this Court] to invade the legislature's province by redistributing litigation costs"—except in limited, historically precedented circumstances, none of which is applicable in this case. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 (1975); *see also id.* at 257-259 & n. 31. Rule 11 should be construed to avoid this conflict with the Rules Enabling Act.

(d) Misconstruction. Even if Rule 11 did apply to appellate proceedings, it would not, by its terms, produce the automatic fee-shifting result reached below.

(e) Fairness. The rule enunciated by the Court of Appeals is unfair in at least two respects. First, it erects a financial impediment to sanctioned persons' appealing Rule 11 orders because it confronts them with the potentially daunting prospect of paying not one but two sets of attorneys' fees should they lose their appeal, even if (as in this case) the appeal is not frivolous. This is particularly bad public policy in an ambiguous, unsettled area of law, like Rule 11, where appellate court guidance is needed most.

Second, as the court below recognized, the rationale underlying the automatic imposition of attorneys' fees upon affirmance of a Rule 11 award equally mandates an award of fees in favor of any party who wins a reversal of a denial of a sanctions

motion. *See Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 897 (D.C. Cir. 1989) (relying on *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179-80 (D.C. Cir. 1985)). Consequently, the decision below not only discourages Rule 11 appeals when brought by sanctioned persons but, conversely, encourages them when brought by unsuccessful movants for sanctions. This disparity of treatment is incongruous and unfair.

ARGUMENT

I. A RULE 41(a)(1)(i) VOLUNTARY DISMISSAL DEPRIVES THE COURT OF POWER TO IMPOSE RULE 11 SANCTIONS

The parties' submissions will doubtless consider in detail the history and import of Rule 41(a)(1) and seek to reconcile it with the operation of Rule 11. It is ATLA's view that the Second Circuit correctly stated the law in *Johnson Chemical Co., Inc. v. Home Care Prods., Inc.*, 823 F.2d 28, 31 (2d Cir. 1987), in which it held that, once a Rule 41(a)(1)(i) dismissal is filed, the district court "los[es] all jurisdiction over the action" so that a subsequent Rule 11 order is "a nullity." *Accord Foss v. Federal Intermediate Credit Bank*, 808 F.2d 657, 660 (8th Cir. 1986); *see also Santiago v. Victim Servs. Agency of Metro. Assistance Corp.*, 753 F.2d 219, 221-22 (2d Cir. 1985); *Thorp v. Scarne*, 599 F.2d 1169, 1173, 1175-76 (2d Cir. 1979).

There is no evidence that Rule 11 was intended to create an exception to the bright line test set forth in Rule 41(a)(1). It should not be deemed to do so, ATLA submits, in light of the purpose of Rule 11, the availability of alternate remedies, the realities of litigation practice, and the significant risk of otherwise promoting piecemeal appeals.

A. A Rule 11 Exception to Rule 41(a)(1) Would Be Counterproductive

There is nothing mysterious about the purpose of Rule 11. The Rule is intended to "reduce frivolous claims, defenses or motions" and thus to deter "costly meritless maneu-

vers. . . ." *See* 97 F.R.D. 190, 192 (1983) (letter from Judge Walter Mansfield, Chairman of the Advisory Committee on Civil Rules, transmitting amended Rule 11 to the Judicial Conference Committee on Rules of Practice and Procedure). The Rule is designed to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." Adv. Com. Note (1983) to Fed. R. Civ. P. 11.

It is specific deterrence—deterrence of the person sanctioned—that is the primary goal of the Rule. Punishment and compensation, as such, are not purposes which Rule 11 was designed to serve. Those are, at best, secondary considerations. *See, e.g., Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989) ("deterrence, not compensation, is the principal goal of Rule 11"); *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 752 (7th Cir. 1988) ("The most important purpose of Rule 11 sanctions is to deter frivolous litigation and the abusive practices of attorneys"); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc) ("the imposition of sanctions pursuant to Rule 11 is meant to deter attorneys from violating the rule"); *Third Circuit Task Force Rep't* at 96 ("Deterrence of abuse by the person sanctioned (specific deterrence) should be regarded as Rule 11's most important goal, and courts should pursue other goals only to the extent necessary or appropriate to attainment of specific deterrence. Compensation should be regarded as one (among many) means to the end of deterrence, not as an end in itself").

The filing of a Rule 41(a)(1) dismissal by a plaintiff satisfies the purpose of specific deterrence. All claims are not merely reduced but withdrawn in full; the threat of meritless maneuvers and dilatory or abusive tactics is ended; and the litigation process has thereby been streamlined. There is no need to read into Rule 41(a)(1) an implicit Rule 11 exception. Rule 11 has served its purpose.

If the contrary rule, adopted below, is affirmed, plaintiffs will be loath to dismiss actions for fear that the dismissal in itself will be used as evidence in the Rule 11 proceedings against them. This is not an idle concern. *See, e.g., Harris v. Marsh*, 679 F. Supp. 1204, 1387-88 (E.D.N.C. 1987), *appeal docketed*,

No. 88-1364 (4th Cir. 1988); *see also Rossman v. State Farm Mut. Auto Ins. Co.*, 832 F.2d 282, 289-90 (4th Cir. 1987). Under the rule articulated below, if the plaintiff does not dismiss, or even if he[1] does, the case will continue to linger on the court's docket and receive additional, unnecessary and perhaps (as in this case) substantial, time and effort by court and counsel.

Even if a Rule 41(a)(1) dismissal were filed to avoid Rule 11 sanctions, the dismissal would serve Rule 11's purposes. This Court has characterized dismissal with prejudice, as a sanction for litigation misconduct, to be "extreme"—"the most severe in the spectrum of sanctions provided by statute or rule. . . ." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). By voluntarily electing to dismiss an action pursuant to Rule 41(a), a plaintiff self-inflicts a sanction of penultimate severity (dismissal without prejudice), precludes the possibility of additional judicial resources being expended on the claim (however viable it may be) and relieves the defendant of the burden of proceeding with a defense. That is a result sought by Rule 11. In an era of clogged dockets, that result should be encouraged and should not subject the plaintiff to the threat of further sanctions pursuant to Rule 11.

B. Creation of a Rule 11 Exception To Rule 41(a)(1) Is Unnecessary

It is a rare plaintiff who starts a lawsuit with the intention of dismissing it under Rule 41(a)(l). Plaintiffs start lawsuits to obtain judicial relief. If one should start a lawsuit in bad faith with no intention of pursuing it, the defendant has a common law remedy: an independent action for either malicious prosecution or abuse of process, or both. *See generally* Restatement 2d, *Torts* §§ 674, 682 (1977); Prosser & Keeton, *Torts* §§ 120-121 (5th ed. 1984); Harper, James & Gray, *Torts* §§ 4.8-4.9 (2d ed. 1986).

1 To facilitate readability, gender neutrality is sometimes abandoned in the text. *Cf.* Fed. R. Civ. P. 53(c) (repeating the same noun six times in first three sentences for want of a pronoun).

The adequacy of these alternate remedies is highlighted by the Rule 11 decisions emphasizing that Rule 11 does no more than effectively incorporate, and subject offending counsel to sanctions for, committing precisely these torts. *See, e.g., Szabo Food Serv. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dism'd*, 108 S.Ct. 1101 (1988) (Rule 11 "effectively picks up the torts of abuse of process (filing an objectively frivolous suit) and malicious prosecution (filing a colorable suit for the purpose of imposing expense on the [opposing party] rather than for the purpose of winning)"). Since Rule 11 provides merely one procedural mechanism for remedying these torts, even without it defendants have their common law remedies.

An aggrieved defendant's alternate remedies are not limited to common law causes of action for wrongful civil litigation. He or she also has an independent cause of action under 28 U.S.C. § 1927 to recover attorneys' fees against any plaintiff's lawyer who so multiplies the proceedings in a case unreasonably and vexatiously as to generate excess costs, expenses and attorneys' fees. *See Gordon v. Heimann*, 715 F.2d 531, 534 (11th Cir. 1983).[2] An aggrieved defendant, therefore, is not remedyless regardless of whether a Rule 11 exception is read into Rule 41(a)(1).[3]

2 Rule 11, in contrast, gives rise to no independent cause of action for attorneys' fees or other sanctions. *See, e.g., Port Drum Co. v. Umphrey*, 852 F.2d 148, 149-50 (5th Cir. 1988). Consequently, at least one circuit that does not permit Rule 11 sanctions to be awarded after entry of judgment does allow post-judgment fee awards under Section 1927. *Compare Obin v. District No. 9, Int'l Ass'n of Machinists & Aerospace Workers*, 651 F.2d 574, 582 (8th Cir. 1981) (allowing post-judgment award of § 1927 sanctions) *with Adduono v. World Hockey Ass'n*, 824 F.2d 617, 620 (8th Cir. 1987) (precluding post-judgment award of Rule 11 sanctions).

3 Similarly, the court and the client of the offending plaintiff's lawyer also have remedies independent of Rule 11. The court may refer the matter of counsel's misconduct to local disciplinary authorities before or after a dismissal has occurred. *See, e.g., McGoldrick Oil Co. v. Campbell*, 793 F.2d 649, 653-54 (5th Cir. 1986); *Steinle v. Warren*, 765 F.2d 95, 101-02 (7th Cir. 1985). The client has a malpractice remedy.

C. Defendants Can Procedurally Protect Themselves Absent a Rule 11 Exception to Rule 41(a)(1)

The bright line test of Rule 41(a)(1) confers procedural power on both plaintiffs and defendants. The power conferred on plaintiffs is evident. They enjoy an unfettered right to withdraw their claims at an incipient stage of the litigation. But the power conferred on the defendant is no less apparent. The defendant alone can join issue and close the Rule 41(a)(1) exit at any time after a complaint is served. That is common strategy in many types of hectic, fast-moving cases, such as takeover litigation.

Nor is a defendant disadvantaged by filing an answer, as the present case illustrates. The respondent chose not to answer the complaint but instead to devote hundreds of hours to preparing a Rule 12(b)(6) motion to dismiss. It could just as well have filed a single page general denial together with a Rule 12(c) motion for judgment on the pleadings (identical in substance to the Rule 12(b)(6) motion it did file) and thereby foreclosed any resort by petitioner to Rule 41(a)(1). It was respondent's election not to join issue that raises the first issue before this Court.

The Rules thus afford defendants the ability to foreclose resort to Rule 41(a)(1) and to file dispositive motion papers at the outset of the litigation. A defendant's conscious election not to prevent use of the Rule 41(a)(1) alternative does not reflect any infirmity in the Rules that need be rectified by reading into Rule 41 an exception not contemplated by the drafters. If the marginal incremental effort required to interpose a general denial is viewed as spurring needless litigation or paperwork, this case is a testament to the magnitude of litigation and peperwork that the contrary rule produces.

Hays v. Sony Corp. of America, 847 F.2d 412, 418 (7th Cir. 1988) (because Rule 11 effectively "imposes a negligence standard," it therefore "defines a new form of legal malpractice"); *cf. Link v. Wabash R.R.*, 370 U.S. 626, 634 n. 10 (1962) ("if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice"). Consequently, there is no need to permit post-dismissal Rule 11 awards to vindicate either judicial processes or clients' rights.

D. Approval of Post-Dismissal Sanctions Will Necessarily Entail Allowing Post-Judgment Awards and Foster Piecemeal Appeals

If a district court has the power to impose Rule 11 sanctions after a case has been dismissed pursuant to Rule 41(a)(1), it would appear evident that the court retains the power to sanction after judgment has been entered. Rule 11 has been so construed by courts of appeals that adopt the reasoning of the court below. *See, e.g., Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 98 (3d Cir. 1988) (holding that district court retains jurisdiction to consider Rule 11 motions after notice of appeal has otherwise divested district court of jurisdiction); *Langham-Hill Petroleum, Inc. v. Southern Fuels Co.*, 813 F.2d 1327, 1330-31 (4th Cir. 1987), *cert. denied*, 484 U.S. 829 (1987) (same); *Hicks v. Southern Md. Health Sys. Agency*, 805 F.2d 1165, 1166-67 (4th Cir. 1986) (holding that district court has jurisdiction to consider Rule 11 motion made months after appellate proceedings have terminated); *In re Ruben*, 825 F.2d 977, 981-82 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1108 (1988) (holding district court had jurisdiction to consider sanctions motion filed 2-1/2 months after appeal dismissed for want of prosecution).

If post-dismissal and post-judgment sanctions may be imposed, there exists the very real prospect that multiple appeals will issue out of the same action. A judgment of dismissal entered on a Rule 12(b)(6) motion or a summary judgment entered pursuant to Rule 56 (including certified summary judgments under Rule 54(b)) will remain immediately appealable under 28 U.S.C. §§ 1291 and 1292(b). But the sanctions awards may—as the above-cited cases reflect—follow long after the first appeal is ripe, litigated and adjudicated. That result is virtually assured by the prevailing holding that a sanctions order does not become ripe for appeal until sanctions have been fixed, even if the Rule 11 violation has been judicially determined long before. *In re Jeannette Corp.*, 832 F.2d 43, 46 n. 2 (3d Cir. 1987); *Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327, 1329 (9th Cir. 1989). Consequently, if the Court is inclined toward affirmance in the

present case, it should consider certain procedural approaches that would tend to diminish the piecemeal appeal threat.

Local Rules. The multi-year delay between the filing of the instant respondent's Rule 11 motion and the district court's decision on the motion is extraordinary by any measure. This Court has previously urged that (1) local district court rules be promulgated to insure prompt filing of requests for attorneys' fees after judgment has been entered and (2) attorneys' fees requests (specifically, under the Civil Rights Attorneys' Fees Awards Act of 1974, 42 U.S.C. § 1988) be heard and decided shortly after entry of judgment. *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 454-55 & nn. 16-17 (1982). Many districts have attended to this Court's suggestion and adopted rules prescribing time periods within which attorneys' fees must be sought after judgment has been entered.[4] District courts should be directed to heed these rules in considering the timeliness of post-judgment Rule 11 motions for attorneys' fees.

Pre-Judgment Motion. Not all districts have promulgated local rules of this sort, however. In the absence of a local rule, a post-dismissal or post-judgment motion for sanctions could conceivably be made at a time quite remote from the actual offense.

To prevent this, the Third Circuit has adopted as a supervisory rule—binding on all courts in that circuit—a requirement

4 *See, e.g.*, S.D. Ala. R. 28(a)-(b); M.D. Ala. R. 20(a)-(b); D. Ala. Gen. R. 21.1; E.D. Ark. R. 27; W.D. Ark. R. 27(a)-(b) & (d); N.D. Cal. R. 270; E.D. Cal. R. 293(a); D. Del. R. 6.3; D.D.C. R. 215; N.D. Ga. R. 270; S.D. Ga. R. 11; D. Idaho R. 11-107(a); N.D. Ill. Gen. R. 46; N.D. Ind. R. 43; N.D. Iowa R. 2.9; S.D. Iowa R. 2.9; D. Kan. R. 220; E.D. Ky. R. 14(a); W.D. Ky. R. 14(a); D. Me. R. 32; D. Md. R. 234; D. Mass. R. 27; D. Minn. R. 6; N.D. Miss. R. 15(b)(1); S.D. Miss. R. 15(b)(1); D. Nev. R. 205-18; D.N.H. R. 39; D.N.M. R. 15(f); M.D.N.C. R. 210; E.D.N.C. R. 29.00, 29.01; D.N.D. R. 23(d); N.D. Okla. R. 6(f); W.D. Okla. R. 6(e); E.D. Okla. R. 6(f); D. Or. R. 265-4; W.D. Pa. R. 33; D. P.R. R. 332; D.R.I. R. 25(3); D.S.C. R. 16.00; M.D. Tenn. R. 13(e); W.D. Tex. R. 300-10; N.D. Tex. R. 12.2; E.D. Va. R. 11(L); E.D. Wis. R. 9. Five courts of appeals have adopted similar rules. *See* 3d Cir. R. 27(1); 5th Cir. R. 47.8; 6th Cir. Internal Op. R. 17; 8th Cir. R. 17; 9th Cir. Rs. 28-2.3 and 39-1.6.

that Rule 11 motions be filed in the district court before entry of a final judgment. *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988). The *Pensiero* Court reasoned that post-judgment or post-dismissal Rule 11 motions threaten to be post-appeal motions, and those are by definition administratively burdensome, and it stressed that "[t]he fragmented appeals arising in [cases before it] graphically illustrate the inefficiency resulting from delay in filing a sanction motion until after resolution of the merits appeal." The Court urged even earlier motion filings—"as soon as practicable after discovery of the Rule 11 violation." *Id.* at 99-100.

ATLA submits that, should this Court construe Rule 41(a)(1) as containing a Rule 11 exception, it should direct that Rule 11 applications be filed before judgment is entered or a dismissal effected, and that decisions be rendered promptly thereafter (e.g., within 30-90 days). This would eliminate the threat of piecemeal appeals and have the additional benefit of placing plaintiffs on notice of their exposure to Rule 11 sanctions. Since Rule 11 motions are themselves subject to Rule 11 and can only be made in circumstances which justify them,[5] the frequency with which such motions will be filed is likely to be limited and the burden on defendants quite modest.

II. THE ABUSE OF DISCRETION STANDARD, INCLUDING CAREFUL MONITORING OF LEGAL ERROR, SHOULD GOVERN REVIEW OF ALL ASPECTS OF A RULE 11 ORDER

There are currently three standards of review applied by the courts of appeals in Rule 11 cases. The abuse-of-discretion standard is most commonly employed. Six circuits—the First, Fourth, Fifth, Sixth, Seventh and Tenth—apply that standard to all aspects of a district court's Rule 11 order. *See, e.g., Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 758 (1st Cir. 1988); *Rolleston v. Eldridge*, 848 F.2d 163, 165-66 (11th Cir. 1988); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 872

5 *See, e.g., Local 106, Serv. Employees Int'l Union v. Homewood Mem. Gardens, Inc.*, 838 F.2d 958, 961 & n. 5 (7th Cir. 1988); *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 797 (9th Cir. 1989).

(5th Cir. 1988) (en banc); *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 793 (6th Cir. 1988); *Mars Steel Corp. v. Continental Bank, N.A.*, 880 F.2d 928, 930 (7th Cir. 1989) (en banc); *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 & n. 3 (10th Cir. 1988).

Farthest removed from the abuse-of-discretion standard is the three-tiered standard developed by the Ninth Circuit in *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). On reviewing a district court order imposing sanctions, the Ninth Circuit reviews (1) factual determinations under the clearly erroneous standard; (2) the legal conclusion that the facts constitute a violation of Rule 11 *de novo*; and (3) the appropriateness of the sanction imposed under the abuse-of-discretion standard. In addition to the Ninth Circuit, the Eighth Circuit applies this three-tiered standard of review. *EEOC v. Milavetz & Assocs., P.A.*, 863 F.2d 613, 614 (8th Cir. 1988).

Finally, four circuits, including the District of Columbia Circuit, have taken a hybrid approach, generally applying the abuse-of-discretion standard but reviewing issues of law *de novo*. *See, e.g., Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n. 7 (2d Cir. 1985); *Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718, 725 (3d Cir. 1988); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); *Int'l Brotherhood of Teamsters (Airline Div.) v. Ass'n of Flight Attendants*, 864 F.2d 173, 176 (D.C. Cir. 1988).

Because of what may fairly be termed the prevailing lawlessness under Rule 11, the American Bar Association Section of Litigation developed and published a set of Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, *see* 121 F.R.D. 101 (1988). The ABA standards endorse use of the abuse-of-discretion standard to review all aspects of a Rule 11 order—factual findings, legal conclusions and the appropriateness of the sanction imposed. *See* ABA Standard Q, 121 F.R.D. at 130. ATLA concurs in this judgment.[6]

6 Use of the clearly erroneous standard to review factual questions, while familiar to the courts of appeals, is inappropriate in Rule 11 cases because—unlike the situation envisaged by Rule 52—Rule 11 sanctions are almost always imposed in the absence of any evidentiary hearing, and they are frequently reviewed in the absence of any factual findings. While the courts of appeals insist that the record reflect the specific reasons for which a sanction is imposed and the basis on which the sanction rests, the degree of specificity required falls far short of that required by Rule 52. *See, e.g., Brown v. Fed'n of State Medical Bds.*, 830 F.2d 1429, 1438 (7th Cir. 1987); *Thomas*, 836 F.2d at 883; *INVST Financial Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 401 & n. 4 (6th Cir.), *cert. denied*, 484 U.S. 927 (1987).

It is crucial, however, that appeals court decisions serve what then-Circuit Judge Scalia in another context referred to as the dual purpose of appellate review—"the correction of legal error and the establishment of legal rules for future guidance." *Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 155 n. 1 (D.C. Cir. 1986) (en banc), *aff'd*, 484 U.S. 9 (1987). The fundamental mandate of the courts of appeals is to consider and rectify errors of the trial courts. This mandate can be fulfilled, under the abuse-of-discretion standard, only as long as it is clear that a district court abuses its discretion if its conclusion rests on an incorrect legal standard. This is an uncontroversial proposition in the circuits,[7] and its endorsement by this Court in the Rule 11 context would be welcome.

III. RULE 11 CONFERS NO AUTHORITY TO IMPOSE SANCTIONS ON APPEAL

A. Under Traditional Rules of Statutory Construction, Rule 11 Defers to Section 1912 and Appellate Rule 38

Congress has enacted a statute specifically addressing the propriety of issuing sanctions on appeal, 28 U.S.C. § 1912. Section 1912 provides that, "[w]here a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay,

7 *See, e.g., Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 810 (4th Cir. 1988); *Parents, Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1239 (2d Cir. 1986); *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 947 (9th Cir. 1985).

and single or double costs." Section 1912 traces its heritage to Act of Sept. 24, 1789, ch. 20, §§ 23, 25, 1 Stat. 85.

To codify judicial construction of this statute, this Court promulgated Appellate Rule 38, effective July 1, 1968, which provides that: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Appellate Rule 38 focuses not on "delay" (the statutory term) but on "frivolousness." In doing so, Appellate Rule 38 codifies the longstanding interpretation the courts had accorded Section 1912. *See* Adv. Com. Note to Fed. R. App. P. 38; *In re Midland United Co.*, 141 F.2d 692 at 692 (3d Cir. 1944); *Commercial Wholesalers, Inc. v. Investors Commercial Corp.*, 172 F.2d 800, 802 (9th cir. 1949); *see also LeFebvre v. Commissioner*, 830 F.2d 417, 418 (1st Cir. 1987). Section 1912 and Appellate Rule 38 are read *in pari materia*. *See, e.g., Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 472 (1st Cir. 1985).

Like Section 1912, Appellate "Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals. . . ." *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 8 (1987). Unlike Rule 11, Section 1912 and Appellate Rule 38 do not mandate the imposition of sanctions, even if an appeal is frivolous and interposes delay. The imposition of sanctions always remains discretionary, not mandatory. Adv. Com. Note to Fed. R. App. P. 38; *Spiegel v. Continental Illinois Nat'l Bank*, 790 F.2d 638, 650-51 (7th Cir.), *cert. denied*, 479 U.S. 987 (1986).

If an award is granted pursuant to Section 1912 or Appellate Rule 38, it may, but need not, include attorneys' fees. Moreover, if attorneys' fees are included, the award may, but need not, reimburse all expenses incurred on appeal. It may consist of any sum that the court of appeals deems appropriate. *Braley v. Campbell*, 832 F.2d 1504, 1513-14 (10th Cir. 1987) (en banc); *United States v. Carley*, 783 F.2d 341, 344 (2d Cir.), *cert. denied*, 476 U.S. 1142 (1986); *Natasha, Inc.*, 763 F.2d at 472.

Under the decision below, the statute and appellate rule specifically addressing whether, and when, appellate sanctions may issue are superseded, not by another statute or appellate rule, but by a rule of civil procedure dealing generally with sanctions

in the district court. The decision below is erroneous, as a matter of statutory construction, for three independent reasons:

First, Rule 11 applies exclusively to district court proceedings. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States district courts"); *cf.* Fed. R. Civ. P. 81 (circumscribing "Applicability in General") and 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts"). Rule 11 has no application on appeal, where Section 1912 and Appellate Rule 38 set the framework for the issuance of sanctions. *See* Fed. R. App. P. 1 ("These rules govern procedure in appeals to United States courts of appeals from the United States district courts . . .").

Second, there is no evidence in the Advisory Committee Note or the Advisory Committee's publicly available working papers that Rule 11, a general sanctioning power adopted in 1983, was ever intended to apply to appellate proceedings, much less to supersede the previously-enacted Section 1912 or Appellate Rule 38.

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be confronted or nullified by a general one, regardless of the priority of enactment."

Radzanower v. Touche, Ross & Co., 426 U.S. 148, 153 (1976) (citation omitted).

This Court has applied the foregoing principle to dispel other efforts to read particular Federal Rules of Civil Procedure as overriding particularized statutes governing cost-shifting in litigation. *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442-43 (1987) (holding that the specific witness fee and cost taxation provisions of 28 U.S.C. §§ 1821 and 1920 limit the broad, general cost provision contained in Rule 54(d)). The District of Columbia Circuit's reading of Rule 11 should fare no better.

Third, under this Court's decision in *Burlington Northern R.R. v. Woods*, 480 U.S. at 7, Rule 38's "discretionary mode

of operation unmistakably conflicts with the mandatory" compensation scheme read by the court below into Rule 11, and necessarily overrides it. In *Woods*, a diversity action, this Court held that Appellate Rule 38 superseded operation of a state sanctions provision mandating an award equal to 10% of the judgment in cases unsuccessfully appealed. This Court reasoned that the mandatory sanctions scheme of the state provision was irreconcilable with the discretionary approach taken by Appellate Rule 38, and that the purposes underlying the rule and state statute were "sufficiently co-extensive . . . to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions." *Id.* at 7.

While the *Erie* implications of *Woods* are absent in the present case, the decision below does present an identical, irreconcilable conflict between (1) the "case-by-case approach to identifying and deterring frivolous appeals" (480 U.S. at 8) embodied in Appellate Rule 38 and Section 1912, and (2) the automatic-penalty approach comprising the lower court's construction of Rule 11. The courts of appeals are, and should be, reluctant to impose sanctions in marginal cases under Section 1912 and Appellate Rule 38. *See, e.g., Zarowitz v. BankAmerica Corp.*, 866 F.2d 1164, 1166 (9th Cir. 1989) ("Too exuberant use of sanctions could chill some meritorious appeals"). As a matter of statutory construction, this considered approach to appellate sanctions should not be overturned, particularly in the absence of any evidence of an intention by Rule 11's drafters to have this impact on the appellate process.

B. There Is No Need to Apply Rule 11 on Appeal

Section 1912 and Appellate Rule 38 provide the primary, but not the exclusive, remedy for misconduct on appeal. There exist at least four other, independent, discretionary sanctioning powers that appellate courts exercise to supplement (but not supplant) Section 1912 and Appellate Rule 38 in sanctioning misconduct on appeal. In view of this plethora of wholly consonant authorities, there is no need, just as there is no warrant, to construe Rule 11 as irreconcilably overriding the lot of them.

To begin with, 28 U.S.C. § 1927 is a penal statute that was enacted to deter unnecessary delay in litigation by requiring attorneys to satisfy personally excess costs attributable to their misconduct.[8] Section 1927 has consistently been held applicable to appellate misconduct. *See, e.g., Herzfeld & Stern v. Blair*, 769 F.2d 645, 647 (10th Cir. 1985); *In re Ginther*, 791 F.2d 1151, 1155-56 (5th Cir. 1986); *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C. Cir. 1986). Like Section 1912 and Appellate Rule 38, Section 1927 authorizes the imposition of sanctions on a discretionary, not a mandatory basis. *See, e.g., Ford v. Temple Hosp.*, 790 F.2d 342, 347 (3d Cir. 1986); *In re Ruben*, 825 F.2d 977, 988 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1108 (1988). Further, while awards of attorneys' fees have been authorized under Section 1927 since its amendment in 1980 (Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156), the court decides how much (if any) to award. *Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 748 (5th Cir. 1984); *Gelco Corp. v. Baker Indus., Inc.*, 779 F.2d 26, 28-29 (8th Cir. 1985).

The courts of appeals are also vested with the inherent power to issue sanctions for abusive litigation practices undertaken on appeal. *In re Kelly*, 841 F.2d 908, 917 (9th Cir. 1988). Somewhat akin to Section 1927, which is strictly construed because it is penal in nature,[9] inherent power sanctions are not broadly or liberally applied but "must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. at 764.

Yet another sanctioning power available to the courts of appeals to penalize attorney misconduct is set forth in Fed. R. App. P. 46(c). Under Appellate Rule 46(c), a court of appeals may "take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or

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8 Like Section 1912, Section 1927 traces its antecedents to early in the history of the United States. *See* 26 Annals of Cong. 29 (1813). The history of Section 1927 is examined in detail in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759-60 (1980).

9 *Braley v. Campbell*, 832 F.2d at 1512; *Smith v. Detroit Fed'n of Teachers*, 829 F.2d 1370, 1378-79 (6th Cir. 1987); *Hagerty v. Succession of Clement*, 749 F.2d 217, 222 (5th Cir. 1984), *cert. denied*, 474 U.S. 968 (1985).

any rule of the court." In the discretion of the court, that action may include a monetary sanction. *See, e.g., United States v. Stillwell*, 810 F.2d 135, 136 (7th Cir. 1987).

Finally, most of the courts of appeals have adopted local rules pursuant to which they may impose sanctions for filing frivolous papers on appeal.[10] These courts include the court below. District of Columbia Circuit Rule 23 provides that, "[w]hen any party to a proceeding before this Court . . . takes an appeal or files a petition or motion that is frivolous or interposed for any improper purpose, . . . the Court may . . . impose appropriate sanctions on the offending party, the attorney or both." Citing Appellate Rule 38 and Sections 1912 and 1927, D.C. Cir. R. 23 further provides that sanctions may include, *inter alia*, "expenses and attorneys' fees."

In light of the existence of no less than six separate powers under which appellate misconduct can appropriately be sanctioned—all of which are discretionary in nature, consistent with Section 1912 and Appellate Rule 38—it is unnecessary to extend the reach the Rule 11 to appellate proceedings. *Cf. Societe Internationale v. Rogers*, 357 U.S. 197, 207 (1958) (declining to hold that Rule 41(b) empowers the district courts to dismiss a complaint as a sanction for a plaintiff's failure to comply with a discovery order; "[t]here is no need to resort to Rule 41(b), which appears in that part of the Rules concerned with trials and which lacks . . . specific references to discovery. . . . Reliance upon Rule 41, which cannot easily be interpreted to afford a court more expansive powers than does Rule 37, . . . can only obscure analysis of the problem before us").

10 *See* 1st Cir. R. 30.8; 2d Cir. R. 38 and 2d Cir. Civ. App. Mgmt. Plan R. 7; 3d Cir. R. 20(4); 4th Cir. R. 30; 5th Cir. R. 42.2; 6th Cir. R. 11(l); 8th Cir. R. 16(e); 11th Cir. R. 42-2; and D.C. Cir. R. 23.

C. To Construe Rule 11 As Mandating Fee-Shifting on Appeal Would Violate the Rules Enabling Act

In enacting the first two sentences of the Rules Enabling Act, 28 U.S.C. § 2072,[11] Congress's purpose was to allocate lawmaking power between itself and this Court, as rule maker. *See generally* Burbank, *The Rules Enabling Act of 1934*, 130 *U. Pa. L. Rev.* 1015, 1025-26, 1123 (1982). The purpose of the procedure/substance dichotomy set forth in this statute is to allocate policy choices—to determine which federal lawmaking body, this Court or Congress, is to decide whether certain rights should exist and, if so, the content of those rights. *Id.* at 1113.

This Court has repeatedly stressed that, except within very narrow parameters, attorneys' fee shifting in contravention of the American Rule[12] is a matter within the power of Congress and not a matter to be judicially determined. *See generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259-60 (1975) (recognizing that Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted"). As this Court observed in *Alyeska:*

> [T]he circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are *matters for Congress to determine*. . . .
>
> [The American Rule] is deeply rooted in our history and in Congressional policy; and *it is not for us to invade the legislature's province by redistributing litigation costs* in the manner suggested by respondents and followed by the Court of Appeals [in awarding attorneys' fees to plaintiffs

11 "[T]he Supreme Court of the United States shall have the power to prescribe, by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." Act of June 19, 1934, Pub. L. No. 73-415, § 1, 48 Stat. 1064.

12 "[A]ttorney's fees are ordinarily not among the costs that a winning party may recover." *Roadway Express, Inc.*, 447 U.S. at 759.

"for having performed the functions of a private Attorney General" absent any statutory authorization].

Id. at 262, 271 (emphasis added).

The decision of the court below changes the standard under which attorneys' fees are awardable on appeal—from one of discretion in the context of a frivolous appeal to one mandating a particular sanction even if the appeal is not frivolous. Congress, however, has identified the choice of standards for imposing fee-shifting sanctions as a matter of specific concern to it. Specifically, when it amended Section 1927 in 1980 to permit awards of attorneys' fees, Congress expressly declined to alter the discretionary, bad faith standard then existing under Section 1927 because it wanted to "insure that the provision will in no way dampen the legitimate zeal of an attorney in representing his client." 1980 U.S. Code Cong. & Admin. News at 2781-82, *quoting* H.R. Conf. Rep. No. 96-1234, 96th Cong., 2d Sess. 8-9 (1980). In fact, the House conferees refused to accept a more liberalized Senate standard which would have permitted (but not required) fee-shifting upon a finding that the offending attorney had "intentionally engage[d] in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation."[13] The House feared that the more liberal Senate standard "would have lowered the standard of dilatory conduct necessary to make out a violation and would have done so to such an extent that . . . the legitimate zeal of attorneys representing their clients would have been chilled."[14] It is for Congress to make dramatic changes in fee-shifting laws, and it has declined to do so.

Importantly, this Court recognized that laws affording rights to attorneys' fees may be substantive for *Erie* purposes in the *Alyeska* decision. 421 U.S. at 259 n. 31. Concededly, the standards for determining what is substantive for *Erie* and for Rules Enabling Act purposes are not identical. *Erie* rests on considerations of federalism, while the Rules Enabling Act rests on the separation of powers doctrine. However, in light of this Court's historical reticence to mandate attorneys' fee-shifting other than as statutorily permitted or historically recognized, the considerations underlying the conclusion in *Alyeska* are equally compelling for Rules Enabling Act purposes. Stated another way, substantive rights are enlarged when they are created for the first time in court decisions, especially in areas historically subject to Congressional prerogative. The decision below runs afoul of the Rules Enabling Act to the extent it mandates fees on appeal and should be reversed for that reason.[15]

13 S. 390, 96th Cong., 1st Sess., § 4 (1979), 125 *Cong. Rec.* 19,916 (1979). *See also* S. Rep. No. 238, 96th Cong., 1st Sess., 2-3, 9-10 (1979).

14 126 *Cong. Rec.* H8048 (daily ed. Aug. 28, 1980). *See also id.* at H8047. *See generally* Burbank, *Sanctions in the Proposed Amendments to The Federal Rules of Civil Procedure: Some Questions About Power*, 11 *Hofstra L. Rev.* 997, 1003-04 (1983).

D. The Court of Appeals' Automatic Attorneys' Fee Analysis Misconstrues Rule 11

If Rule 11 did apply directly to the appellate process, it would not, by its terms, justify the decision of the court below. Rule 11 provides that a sanction is mandatory once a violation is found, but it does not mandate what that sanction must be. The Court of Appeals has construed the Rule not only as mandating a sanction on appeal (absent any appellate misconduct) but also as mandating a particular sanction, attorneys' fees. Rule 11 does not so provide, and to read the Rule in that fashion would lead to quite anomalous results.

Attorneys' fees are only one of many types of sanctions awarded by courts for violations of Rule 11. These sanctions

15 In *Burlington Northern, Inc. v. Woods*, this court held that the discretionary sanctions power of appellate Rule 38 is, for *Erie* purposes, procedural and not substantive. 480 U.S. at 8. Rule 38 also plainly falls within the parameters set by the Rules Enabling Act because its discretionary sanctions power is consistent with the discretionary approaches of Sections 1912 and 1927. *Burlington* did not address the validity, under the Rules Enabling Act, of an automatic mandatory fee-shifting provision such as Rule 11 as construed below. Importantly, the source of authority for Rule 11 itself, as cited in the 1983 Advisory Committee Note, is discretionary, not automatic or mandatory ("the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation [citing *Roadway Express*]").

range from simple reprimands and warnings,[16] to mandatory continuing legal education,[17] fines,[18] referrals to attorney disciplinary authorities,[19] preclusion, dismissal or default orders,[20] suspension or disbarment from practice[21] and injunctions precluding future access to the courts.[22] In many cases, district judges expressly refuse to award attorneys' fees to parties prevailing on Rule 11 motions, choosing instead one of these alternatives. Refusals to award fees have routinely been upheld on appeal. *See, e.g., Pony Express Courier Corp. of America v. Pony Express Delivery Serv.*, 872 F.2d 317, 319 (9th Cir. 1989) (rejecting appellant's argument that the district court abused its discretion by refusing to impose monetary sanctions after finding a Rule 11 violation).

Yet, under the decision of the court below, every district court sanctions order not awarding attorneys' fees will give rise to an automatic award of attorneys' fees on appeal if the lower court's decision is affirmed. This result is incongruous.

Rule 11 was never intended to dictate imposition of a particular sanction. It does not do so in district court and should not be construed as doing so in appellate court. It certainly does not mandate automatic imposition of attorneys' fees.

E. The Court of Appeals' Construction of Rule 11 is Manifestly Unfair

To read into Rule 11 a requirement of mandatory fee shifting upon affirmance of a sanctions award leads to unfair treatment of litigants in at least two respects.

16 *See, e.g., In re Kelly*, 808 F.2d 549, 552 (7th Cir. 1986).

17 *See, e.g., Stevens v. City of Brockton*, 676 F. Supp. 26, 27 (D. Mass. 1987).

18 *See, e.g., Cheek v. Doe*, 828 F.2d 395, 397 (7th Cir.), *cert. denied*, 484 U.S. 955 (1987).

19 *See, e.g., McGoldrick Oil Co. v. Campbell*, 793 F.2d 649, 653-54 (5th Cir. 1986).

20 *See, e.g., Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987).

21 *See, e.g., Donaldson v. Clark*, 819 F.2d, 1551, 1557 n. 7 (11th Cir. 1987) (en banc).

22 *See, e.g., Cotner v. Hopkins*, 795 F.2d 900, 902-03 (10th Cir. 1986).

First, and most obviously, the threat of sanctions on appeal will serve to inhibit persons otherwise inclined to file non-frivolous appeals (i.e., appeals that are otherwise not sanctionable, under any of the other six sanctioning powers currently existing). In an area of law as clouded with uncertainty and ambiguity as Rule 11—an area which, in the American Bar Association Section of Litigation's words, is marked by "uneven application of Rule 11 by the courts," 121 F.R.D. at 104—discouraging appeals that would assist in remedying this situation is contrary to sound public policy.

Moreover, the impediments placed on potential appellants may effectively deny them use of appellate procedures, and in that fashion effectively deny them an opportunity to be heard. *Cf. Boddie v. Connecticut*, 401 U.S. 371, 377-378 (1971). This is peculiarly bad public policy in light of the frequency with which district court sanctions decisions are reversed, not merely because the sanctions are unwarranted, but because the legal positions viewed by the district courts as frivolous are determined by the courts of appeals to be substantively correct. *See, e.g., Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 570 (9th Cir. 1988); *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir. 1987); *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1163 (9th Cir. 1987).

Second, the rule articulated by the Court of Appeals discriminates unfairly between litigants in Rule 11 cases, regardless of whether those litigants have won or lost the Rule 11 motion. This discrimination is evident when it is realized that the Court of Appeals' holding dictates not only that fees be automatically awarded to parties who win affirmance of Rule 11 award motions, but equally requires that fees be awarded to parties who successfully appeal denials of Rule 11 sanction motions. The District of Columbia Circuit explicitly based its decision below on its earlier decision in *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179-80 (1985), in which it awarded the successful challenger of a denial of Rule 11 sanctions his appellate expenses. It did so on the same linguistic analysis, concluding that an appellant should be awarded its appellate expenses because they were "in court because of" the Rule 11 violation. *See* 875 F.2d at 897-98, quoting *Westmoreland*, 770 F.2d at

1179. The decision below "merely reaffirm[ed] *Westmoreland*'s premise that Rule 11 authorizes an appellee to recover the costs it incurs in a successful defense of a Rule 11 award." 875 F.2d at 898.

With this background, consider a common circumstance: a Rule 11 motion that is granted in part and denied in part. The party against whom sanctions have been assessed can appeal only at risk of paying his opponent's attorney's fees should he lose. His opponent, however, can appeal that portion of the order which denied Rule 11 sanctions, confident of winning his fees if he prevails and free of any risk of paying his opponent's fees if he loses. There is no sound basis for incentivizing appeals by parties who have unsuccessfully made Rule 11 motions and disincentivizing appeals by parties against whom sanctions have been lodged. Once the right of appeal has been granted, it should be available to all litigants on an equal and non-discriminatory basis. *Cf. Lindsey v. Normet*, 405 U.S. 56, 78-79 (1972).

CONCLUSION

For the reasons stated above, it is respectfully requested that the Court answer Issues No. 1 and 3 in the negative and Issue No. 2 in the affirmative, with the admonition and the clarification previously suggested.

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No. 89-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,
Petitioner,

v.

HARTMARX CORPORATION, *et. al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF PUBLIC CITIZEN URGING REVERSAL

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BRIEF *AMICUS CURIAE* OF PUBLIC CITIZEN URGING REVERSAL

INTERESTS OF *AMICUS*

Public Citizen, through the ten lawyers in its Litigation Group, regularly litigates in the federal courts, sometimes on its own behalf, but often on behalf of individuals and other organizations, generally on the plaintiff's side. Public Citizen is filing this brief because of its concern that Rule 11 of the Federal Rules of Civil Procedure has been applied in this case and elsewhere in a manner that threatens to chill important litigation in the federal courts. Although neither Public Citizen nor its clients have been subjected to this type of misuse of Rule 11, other groups who share Public

Citizen's goals and who seek to use the federal courts to promote justice have been adversely affected by rulings in cases similar to this one. In addition, Public Citizen's attorneys have been asked with increasing frequency to represent members of the Bar, individual clients, and nonprofit organizations that have been sanctioned under Rule 11.

This brief is filed with the consent of the parties and in coordination with the brief of the petitioner. It attempts not to duplicate the arguments made therein but to offer a different perspective. It also seeks to flesh out for the Court the ramifications that this case will have on other litigation, by suggesting additional considerations that bear on the outcome of the three questions presented.

STATEMENT OF THE CASE

After this antitrust action was filed by petitioner on behalf of the plaintiff Danik Inc., the defendants/respondents moved to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Shortly thereafter, they filed a motion for sanctions against Danik and petitioner — the law firm which employs the lawyers who signed the pleadings — alleging that the complaint was made without reasonable factual inquiry, as required by Rule 11 of the Federal Rules of Civil Procedure. Respondents then moved to take the deposition of Danik's principal owner, John Dashtara, and despite the pendency of respondents' own motions to dismiss under Rule 12 and for sanctions under Rule 11, the district court refused to quash the notice. Therefore, after answering both motions, Danik had to subject its principal owner to a deposition, including inquiries into attorney-client matters relating to the pre-complaint investigation,

even though there had not yet been a ruling on the merits of respondents' supposedly dispositive motion to dismiss.

With the case in this posture, Danik filed a notice under Rule 41(a)(1) of the Federal Rules of Civil Procedure, dismissing the case without prejudice, as it had an absolute right to do without the consent of respondents, and without any conditions of the kind applicable to dismissals under Rule 41(a)(2). Nonetheless, respondents insisted that the dismissal applied only to the merits and not to the pending Rule 11 motion, and urged the district court to impose sanctions against petitioner. Nearly four years later, the court decided to impose sanctions and ordered the submissions of affidavits as to the amount of attorneys' fees to be awarded. It subsequently entered an order awarding fees in excess of $30,000, two-thirds of it against petitioner, and one-third against Danik.

Both petitioner and Danik appealed, and the Court of Appeals for the District of Columbia Circuit affirmed the judgment against petitioner, after Danik's appeal was dismissed when Danik went into bankruptcy. First, the court ruled that the filing of a voluntary notice of dismissal did not deprive the district court of the power to issue sanctions, and then it upheld the award, ruling that the imposition of attorneys' fees in this case was not an abuse of discretion. In addition, it held that respondents had an automatic right to attorneys' fees for their successful defense of the imposition of sanctions, and it remanded the case to the district court for a determination as to the proper amount of attorneys' fees for the appeal.

On October 16, 1989, this Court granted the writ of certiorari, limiting its review to questions relating to the effect of the Rule 41(a)(1) dismissal, the standard of review on appeal, and the issue of fees for defending the sanctions ruling on appeal. However, two weeks prior to the granting

of review, this Court heard argument in *Pavelic & Le Flore v. Marvel Entertainment Group*, No. 88-791, which presents the question of whether a law partnership, of which the attorney who signed a pleading was a member, may be held liable for sanctions under Rule 11, along with the individual attorney. If this Court holds in *Pavelic & Le Flore* that Rule 11 does not apply to the law firm, reversal here would be mandated because respondents' motion for sanctions was filed only against the law firm and the client, the judgment was entered only against the law firm and the client, and no appeal was taken by respondents from that judgment. Admittedly, petitioner did not present the *Pavelic* issue to this Court or to the court of appeals. Nonetheless, reversal on that ground would still be required since, under Rule 11 as so construed, the district court would have lacked the power to award sanctions against petitioner, and so long as the judgment has not become final, such plain error should be corrected by this Court. But regardless of the result in *Pavelic*, reversal is required here for the reasons set forth below.

SUMMARY OF ARGUMENT

1. The district court should never have reached the merits of the Rule 11 motion because the filing of a Rule 41(a)(1) dismissal deprived the court of power to pass on that motion. This reading of Rule 41(a)(1) is confirmed by the text of the Rule itself, which contains specific exceptions that do not include motions under Rules 11 and 12, and it also promotes the policy of encouraging plaintiffs to dismiss cases that they no longer wish to continue. The fact that a Rule 11 motion was pending when the dismissal occurred should have no relevance because, if it did, it would encourage the automatic, early filing of such motions.

That practice is undesirable because it would burden the courts and the litigants with sometimes unnecessary and almost always divisive motions. It would also create an immediate potential conflict of interest between attorney and client because of the divergent interests that they have with respect to the outcome of the substantive and sanctions motions. Finally, in most cases it would create a conflict with regard to the proper response to the sanctions motion because the client's best defense is often to blame the lawyer for any errors.

2. A three-tier scope of review is necessary for sanctions appeals: a clearly erroneous standard for factual determinations, *de novo* review for the legal question of whether the conduct at issue violates the Rule, and an abuse of discretion standard for the choice of sanctions if a violation is found. Only in this way can the appellate courts assure that the standards of Rule 11 are followed and that trial courts neither utilize an excessively harsh standard, nor refuse to impose any sanctions at all when the requisite reasonable inquiry has not been made.

3. There is no basis in any statute or Rule for awarding respondents fees for defending the sanctions award in the court of appeals. Indeed, the only Rule that bears directly on this question — Rule 38 of the Federal Rules of Appellate Procedure — allows fees on appeal, but *only* if the appeal is found to be frivolous, which the court did not find, and could not have found here. Moreover, there is no principled basis for awarding fees to the winner on appeal in a sanctions case only for defending an award made below, and hence the rationale offered by the court of appeals would create a general fee-shifting rule for all sanctions cases. Indeed, the assertion by the court of appeals —that fees were needed to protect the full benefit of the award made below — would apply to every defense of a favorable

judgment and thereby alter the basic American Rule and entitle the winner in the court of appeals to attorneys' fees in every case. Plainly, the courts have no such power on their own to alter the American Rule, and nothing in any Rule or statute purports to give that power to them.

ARGUMENT

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

A. *The Effect of a Rule 41(a)(1) Dismissal*

On its face, Rule 41(a)(1) gives a plaintiff an absolute right to obtain dismissal with no conditions attached, if the notice is filed before an answer or motion for summary judgment is filed, unlike under Rule 41(a)(2) where the court may allow dismissal on "such terms and conditions as the court deems proper." Moreover, the inclusion in Rule 41(a)(1) of explicit exceptions for Rules 23(e) and 66, as well as for any applicable statutes, underscores the plain reading of Rule 41(a)(1) that it does not permit an exception for Rule 11 motions. In this regard, we note that the exception for statutes, which is probably necessary under the Rules Enabling Act, would permit the court to impose sanctions under provisions such as 28 U.S.C. § 1927, if the strict terms of that provision were found applicable. Similarly, if attorneys' fees were available to a prevailing defendant under 42 U.S.C. § 1988 or some other provision — but not under the antitrust laws which were at issue here, *see* 15 U.S.C. § 15(a) (fees only for plaintiffs, not prevailing parties) — those, too, would not be

precluded.[1] Thus, we do not argue that the district court lacked "jurisdiction" to decide the Rule 11 motion after dismissal; rather we argue only that the plain meaning of Rule 41(a)(1) does not allow Rule 11 sanctions motions to go forward.

A strict application of Rule 41(a)(1) is entirely appropriate. It is one of the few rules which allows an action taken by one party, here the plaintiff, to be determinative without any role for the other side. That does not mean, however, that a defendant who *is* concerned about the preclusive effect of Rule 41(a)(1) is left without recourse since the filing of an answer or the making of a motion for summary judgment would preserve any right to move under Rule 11. Of course, that protection does not assist respondents here since they only moved for dismissal under Rule 12. Because the drafters of Rule 41(a)(1) plainly decided to treat motions to dismiss and motions for summary judgment quite differently in allowing Rule 41(a)(1) dismissals, the courts are bound by that choice. Finally, there is a sound policy reason to allow plaintiffs to avoid Rule 11 motions through voluntary dismissals: it will encourage them to dismiss lawsuits at the earliest stage if they determine that they have no merit or for any other reason. Rule 41 (a)(1) draws a clear line, and it should be followed here.[2]

We recognize that, before the Rule 41(a)(1) notice of dismissal was filed here, respondents had filed a motion to

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[1] There is no problem of timeliness if attorneys fees are not requested until after a final judgment is entered. *See White v. New Hampshire*, 455 U.S. 445 (1982).

[2] Unlike a Rule 12 motion to dismiss, a motion for summary judgment does not relieve a defendant of filing an answer within the time required by Rule 12(a).

dismiss under Rule 12 and a sanctions motions under Rule 11. While we believe that the filing of the Rule 12 motion has no effect under Rule 41(a)(1), we recognize that there are arguments to the contrary. We write here principally to urge the Court that, whatever the relevance of the Rule 12 motion may be, this Court should not attach any significance to the fact that a Rule 11 motion was filed before plaintiff dismissed the case. Moreover, as we now demonstrate, there are several important reasons why the Court should disregard the filing of the Rule 11 motion in passing on the effect of the filing of the notice under Rule 41(a)(1).

First, giving any weight to the pendency of a Rule 11 motion would only encourage the early filing of such motions, and there are more than enough Rule 11 motions filed in the federal courts, whatever their merits may be. *See* G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (Michie Press 1989) (book of almost 700 pages, nearly half devoted to Rule 11 alone). The immediate effect of the filing of a Rule 11 motion is to raise both the stakes in the lawsuit and the level of hostility, thus making compromise less likely. That, in turn, increases the burdens on the courts that must not only decide the merits, but rule on often complex legal and factual issues raised under Rule 11. *See Advisory Committee Notes to 1983 Amendments to Federal Rules of Civil Procedure*, 97 F.R.D. 165, 201 (1982), expressing concern about "the cost of satellite litigation over the imposition of sanctions . . .." *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (warning against turning attorneys' fees disputes into "a second major litigation"). Indeed, in this case, respondents were allowed to take discovery from Danik on the Rule 11 issue, even though they had already filed their Rule 11 motion claiming a right to obtain sanctions, while at the same time insisting

that they needed additional information to prevail on that motion.

Second, the filing of a Rule 11 motion, while a substantive motion is pending, generally raises several possible conflicts of interests between the attorneys and the client. To begin with, Rule 11 specifically allows for sanctions to be imposed against either the attorney, or the client, or both. Since sanctions are usually sought against both attorney and client, as they were here, the lawyer has an inherent conflict of interest if the Rule 11 motion has any arguable basis whatsoever. Because the lawyer will have a direct personal stake in the Rule 11 outcome, he or she may become more concerned about defending the Rule 11 motion than about opposing the motion to dismiss, which principally affects only the client.

Furthermore, we have seen a number of sanctions motions in which, under the ordinary standards of conflicts of interest, the client needs separate representation, since the best way for the client to avoid liability is to blame any mistakes on the attorney, especially if the question relates to the adequacy of the legal investigation or whether a reasonable inquiry into the facts was conducted before the filing of the complaint. However, in the typical case, the client does not recognize the need to obtain separate representation immediately, and lawyers are generally slow to call the problem to the client's attention. It is only after the sanctions judgment has been entered, and the case is on appeal, that the client will obtain separate counsel, well after the point when an adequate record can be presented explaining the diverging interests of the lawyer and client. Indeed, in those cases where the lawyer is employed by a nonprofit organization, the conflict may become a three-way proposition, with different standards of liability applying to client, lawyer, and employer.

Beyond this problem relating to the need for separate representation on the sanctions issue, there is another problem that arises even if the sanctions motion does not create this divisiveness between lawyer and client at the outset of the case. If the defendant is both moving to dismiss and moving for sanctions, and the lawyer has to defend both motions at the same time, that will have an immediate and adverse impact on the merits. Thus, the lawyer will be in a position of arguing both that the case should not be dismissed, but even if it should, the arguments are not so frivolous as to be a basis for imposing sanctions. Not only does having to defend simultaneously against the Rule 11 motion have the effect of undermining the defense of the substantive motion, it is our experience that such simultaneous filings are often done for the very purpose of assuring a dismissal, with the imposition of sanctions just icing on the cake.

Finally, the tactics employed by defense counsel in this case, while not unlawful or unethical, illustrate still another serious problem with filing Rule 11 motions while motions to dismiss are pending. As set forth in greater detail in petitioner's brief, respondents were given the opportunity, over Danik's objection, to depose Danik's principal owner about the pre-complaint investigation while the Rule 12 motion to dismiss filed by respondents was still pending. Not surprisingly, the deposition moved into several areas touching on the attorney-client privilege, thereby making the choice between defending on the merits and fighting off sanctions even more painful. While attorney-client privilege issues may be unavoidable *after* the merits are resolved, allowing Rule 11 motions to be filed in circumstances such as this unnecessarily exacerbates the problem, with no increase in fairness or accuracy in the

litigation process to justify driving this further wedge between attorneys and their clients.

For these reasons, we urge the Court, in passing on the Rule 41(a)(1) issue, to hold that it was irrelevant that respondents had filed a Rule 11 motion before the notice of dismissal was filed. Simultaneous filings of substantive motions and motions under Rule 11 should be viewed with great skepticism and surely should not be encouraged by having the pendency of the Rule 11 motion affect the outcome in this case. We further urge the Court to make it clear that the time for filing a sanctions motions is *after* the substantive motion has been resolved, when the parties will have the benefit of the district court's rulings. At that point, it may be apparent that the court would look with substantial disfavor on a Rule 11 motion, or it may be clear that the court is inclined to grant modest sanctions, and hence the matter might be resolvable without further litigation. At the very least, a limited delay in filing will assure that unnecessary satellite litigation under Rule 11 will not occur and conflicts of interest of the kind described above are avoided — results that will produce positive benefits to judges, clients, and lawyers in federal court litigation.

B. *Scope of Review*

There are three basic types of questions presented in sanctions cases, each requiring a separate standard of review, as the Ninth Circuit has recognized in *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). We agree with that analysis and explain our reasons below.

1. *Historical Facts.*

In many sanctions cases, the court has to determine what was done by the lawyer before a particular pleading was filed, *i.e.*, did he or she interview certain witnesses or read certain documents? When the issue is legal, rather

than factual, the inquiry will include what was the nature of the research, how many hours were spent, what cases were read, and were the leading authorities shephardized? Like all other questions of fact, these should be subject to the clearly erroneous standard under Rule 52(a), much as the courts have done for attorneys' fees when those types of issues have arisen in disputes in that area. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116 (3d Cir. 1976).

2. *Rule Violations.*

Based on the facts found, the next question is, did the attorney violate the standards under Rule 11? The answer to that question is resolved by applying the facts to the law. Because it is important for lawyers to know what is expected of them, and because Rule 11 does not suggest that, once the basic facts have been found, there should be different standards for different judges or in different parts of the country, it is critical that there be uniform answers to a given question. Accordingly, review on the issue of whether Rule 11 has been violated should, like all questions of law, be reviewed *de novo*.

Such a standard does not preclude some deference to the district court on what constitutes a reasonable inquiry. Thus, the customs and experiences of the members of the Bar in that district surely count for something in determining whether the inquiry was reasonable. To the extent that the reasonableness inquiry is not included in the factual determinations, it would entitle the court of appeals to give the benefit of the doubt to a trial judge in a close case. However, that standard is a far cry from the relaxed, abuse of discretion standard applied by the D.C. Circuit. Indeed, under 42 U.S.C. § 1988, which authorizes fees in civil rights cases by the district court "in its discretion," this Court has not hesitated to review the legal standards with no hint of

deference to the district court. *See e.g., Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart, supra.*

Defining the proper standard of review is not merely a question of picking among equally appropriate alternatives. Rather, the scope of review may not only determine the result of an appeal, but may sharply affect whether a sanction will be imposed in the first place. Litigation is inherently an adversarial process, in which tempers sometimes become short, lawyers occasionally overstep the grounds of civility in representing their clients zealously, and trial judges, like all human beings, develop animosities toward one party or one attorney in some cases. Rarely will the outcome on the merits be affected by such human frailties, but that cannot be said with confidence on the matter of sanctions, as indeed this case seems to suggest. *See* Brief of Petitioners at 12 (reciting sequence of events suggesting that long-dormant sanctions motion was apparently revived by counsel's actions in an unrelated case). While no system of review can prevent all miscarriages of justice, applying a *de novo* standard will help assure that a trial judge's decision on a sanctions motion will be made for reasons that are proper under the law.

There is a final reason why this element of a sanctions ruling should be reviewed *de novo*. In assessing the proper scope of review, fundamental principles of fairness require that, if an abuse of discretion standard is applied in reviewing a sanction that has been imposed, the same standard must be applied if a party has sought sanctions, but they have been denied. There is no basis in the Rule or otherwise for different degrees of appellate review depending on whether the sanctions motion was successful; if district judges are given broad discretion in one situation, they must be given it in the other. However, under the

approach of the court of appeals, regardless of how the sanctions motion is resolved, there is a vast potential for undermining the standards established by the Rule. Thus, if district judges do not impose sanctions when Rule 11 requires it, or impose them when the Rule forbids it, they have, in effect, the power to rewrite Rule 11. Nothing of which we are aware gives district courts such power, and the scope of review should not be used as a back door means of achieving that result.

3. *The Appropriate Sanction.*

Courts have wide ranges of choices in imposing sanctions, from reprimands, to small fines, to partial or full attorneys' fees. In making that choice, it is important for courts to keep in mind that the goal of Rule 11 is deterrence, not compensation. *See Advisory Committee Notes, supra*, 97 F.R.D. at 198 (noting inadequacy of prior Rule in "deterring abuses" and stating goal of amended Rule to "discourage dilatory or abusive tactics..."); *id.* at 199-200 ("word 'sanctions' in the caption... stresses a different orientation in dealing with improper pleadings, motions or other papers"). Thus, while an award of attorneys' fees may sometimes be necessary as a means of deterring the sanctioned conduct, such an award is a means to an end, not an end in and of itself, as is the case in fee-shifting statutes. The district court is in the best position to assess the entire case and thereby to decide on the appropriate level of deterrence. Because that will vary from case to case, district courts should be given broad leeway in making their choices, which should be reviewable under an abuse of discretion standard, subject to the following limitations.

For instance, if a district judge determines that the proper sanction is an award of attorneys' fees, there may nonetheless be some questions left that are not subject to the abuse of discretion standard. Thus, if the award is for

the time of in-house counsel, the proper hourly rate must be chosen. Should the market rate, which would be used in most attorneys' fees cases under 42 U.S.C. § 1988 or the antitrust laws, be applied, or does the portion of Rule 11 referring to "reasonable expenses incurred" suggest a cost-based approach? That issue is not presented here because respondents used outside counsel, but the question of which rate is proper is a discrete question of law, reviewable *de novo*, even though it is an element in deciding the appropriate sanction, which is reviewable on an abuse of discretion basis. *See Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718, 725 (3d Cir. 1988).

Similarly, if a sanction of attorneys' fees has been granted where a defendant filed a wholly improper motion to disqualify counsel, the question of whether that would entitle the plaintiff to fees for the entire case, or just for opposing that motion, is a question of law, not answered under the abuse of discretion standard. Or, if the court makes a factual finding as to the number of hours worked on a particular motion, that finding would be subject to the clearly erroneous standard under Rule 52(a).

Our basic point is that it is essential for the reviewing court to examine the specific objection being made to the particular sanction and to apply the appropriate standard of review to that objection. To be sure, a single standard of review for all sanctions questions has the virtue of simplicity and, as such, is a seductive approach. But like most seductive approaches, it has far more risks than benefits and accordingly should be rejected by the Court.

C. *Fees on Appeal.*

The court of appeals, following its prior decision in *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179-80 (D.C. Cir. 1985), ruled that a party that successfully defends a Rule 11 sanctions motion on appeal is automatically entitled

to fees for doing so. According to the court, such a rule is necessary to prevent the erosion of the award by having to spend uncompensated time defending it on appeal. While we do not disagree with the dilution premise, that premise applies every time an appellee has to defend any monetary award made by a district court, and therefore cannot be a basis for determining the outcome of this particular fee-shifting inquiry.

The court of appeals did not rely on any specific authorization for awarding fees for the appeal. Rule 11, of course, contains no such authorization, and, like all of the Rules of Civil Procedure, it is applicable only to the district court. *See* Rule 1. Moreover, Rule 11 is not intended as a general compensation provision, but is designed to deter substandard conduct, with an award of attorneys' fees simply a means to that end.

On the other hand, there is a Rule specifically applicable to fees for appeals, Rule 38 of the Federal Rules of Appellate Procedure, which is based on 28 U.S.C. § 1912. Rule 38 allows damages, as well as single or double costs, which have been interpreted to include attorneys fees, but only if the appeal is "frivolous." *See also* 28 U.S.C. § 1927 for additional authority to impose sanctions, including attorneys fees, in exceptional circumstances. There would, of course, be no issue of power to award fees if the court of appeals had found the appeal frivolous in this case, but it did not. Moreover, there is no other apparent authority for awarding fees, and the general American Rule is that, with certain narrow exceptions not applicable here, fees are not awarded in the absence of statutes specifically authorizing them. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Even assuming that a Rule such as Rule 11 or Rule 38 could modify the general American Rule, if it explicitly provided for automatic fee-shifting, neither

Rule has done so here, and, indeed, Rule 38 has provided a very different standard.

It is true that, when Congress has decided to allow fees to a prevailing plaintiff, it is generally held that fees are available for obtaining and/or defending the fees that are awarded. *E.g.*, *Gagne v. Maher*, 594 F.2d 336, 343-44 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980); *but see American Academy of Pediatrics v. Bowen*, 795 F.2d 211 (D.C. Cir. 1986) (EAJA fees not available where government acts reasonably in interposing technical defenses in opposing fees). This result under fee-shifting statutes is distinguishable from the Rule 11 situation in several important respects. First, in those statutes Congress has made a policy judgment that full attorneys' fees are of paramount importance, whereas Rule 11 contains no such overriding goal. Second, fee-shifting statutes are primarily intended to be compensatory, whereas deterrence not compensation is the principal goal of Rule 11. Finally, under most fee-shifting statutes, the lawyer is acting as a private attorney general, and the legislative decision to award fees is based in part on the need to provide an incentive to attract counsel to advance important government policies, which might not be pursued without that incentive due to marketplace imbalances.

Relying on the need to advance the supposed compensation policies of Rule 11, the court of appeals believed that fees on appeal were automatically required. What the court of appeals overlooked, however, is that there are two policies that have to be carefully balanced in applying Rule 11. The first is to deter improper conduct, which the court of appeals recognized, but the second is to assure that proper litigation is not chilled through over-deterrence. *See Advisory Committee Notes*, *supra*, 97 F.R.D. at 199. When that policy is taken into account, as it

must be, the resulting balance is very different. In order to illustrate the problem with the approach of the court of appeals, it is useful to examine other possible sanctions appeals, different from this case in which the award of sanctions was followed by an unsuccessful appeal.

Thus, if respondents here had been unsuccessful in seeking sanctions, and they had taken an appeal and won, would they be entitled to fees for the appeal? If the sole purpose of Rule 11 was as stated by the court of appeals, there would be no doubt that fees should be awarded there as much as they were in this case, as indeed they were in *Westmoreland*, the case relied on by the court of appeals here. Such a result would clearly encourage vindication of Rule 11, but it would also encourage appeals and substantially increase satellite litigation.

Or, assume that respondents had failed to gain sanctions, had appealed, and lost. In that situation, given the multiple purposes of the Rule, appellee — petitioner here — should also be entitled to fees since, if they were not awarded, it would create an asymmetry not justified by any of the Rules. Indeed, Rule 38 would support a fee award in that situation far more than it would support a fee award in the preceding example because Rule 38 specifically allows fees to a successful appellee, but not to a victorious appellant.

Or, suppose that respondents had obtained a sanctions award in the district court, and that petitioner had appealed, and the court of appeals had reversed. Since one of the concerns of Rule 11 is not to chill potentially meritorious litigation, under the analysis of the D.C. Circuit Rule 11 would best be served by awarding fees in that case also. Yet, Rule 38 points in precisely the opposite direction. Thus, while the court of appeals suggested that allowing

fees in this case was a narrow exception, its rationale has no limitation as applied to sanctions cases.

There are other problems with the result reached by the court of appeals. In this case, the sanction against petitioner exceeded $20,000, which created a monetary incentive, as well as a desire to vindicate the firm's reputation, for taking an appeal. But suppose the "fees for fees" rule of the court of appeals were followed, and the district court had, quite correctly, imposed only a small sanction — say $500 — because it thought that the pre-complaint investigation was deficient in some respect. In that case, the lawyer would have to be very confident of victory to risk not only spending time in prosecuting the appeal, but also the real risk of additional fees at perhaps $200 per hour for 50-100 hours if the appeal is unsuccessful.

To be sure, if fees were allowed *only* for defending an award of sanctions on appeal, that would reduce the incentives to appeal a small award, but there are already more than ample disincentives in taking an appeal for a lawyer who regularly appears in a court of appeals and for whom a published, adverse sanctions opinion would do serious damage to his or her reputation. And, if the appeal is frivolous, there is always the possibility of the court invoking Rule 38 or 28 U.S.C. § 1927. Thus, the rule allowing fees for appeals adopted by the D.C. Circuit would virtually insulate from review the quite common sanction of a modest monetary award, coupled with a sharper, and sometimes unwarranted criticism of the lawyer's performance.[3]

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[3] For two cases in which Public Citizen attorneys represented other attorneys who sought review in this Court of small sanctions awards, *see McNeil v. United States*, No. 87-992 ($278.68) and *Platt v. U.S. Court of Appeals for the Seventh Cir.*, No. 88-1756 ($1000, plus costs of appeal).

Perhaps the courts should have broad discretion in all sanctions cases to award fees on appeal, depending on all the facts and circumstances of the case. However, the present Rules do not give the courts any such authority, and Rule 38 seems quite clear that fees are awardable only for frivolous appeals. Moreover, the court of appeals never faced the question of why the policies behind Rule 11 are so much stronger than the policies behind the securities laws, the tort laws, or any of the other federal and state laws which form the basis for lawsuits in the federal courts. The rationale offered by the court of appeals would apply in every appeal involving those cases, and for that reason alone cannot be used to justify the award here. Accordingly, for all of those reasons, there is no basis for awarding fees for Rule 11 appeals, unless the standards of Rule 38 or 28 U.S.C. § 1927 are met. *Accord*, American Judicature Society, *Rule 11 in Transition: Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11*, 52 (1989).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE CHICAGO COUNCIL OF LAWYERS AS AMICUS CURIAE

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BRIEF OF THE CHICAGO COUNCIL OF LAWYERS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Chicago Council of Lawyers is a public interest bar association with a long standing commitment to promoting high ethical standards for attorneys. Founded in 1969, the Council's membership

includes attorneys in private practice, government service, and law schools.

Rule 11 of the Federal Rules of Civil Procedure provides for an award of sanctions against attorneys who do not conform to its standards. Such awards are of considerable concern both to attorneys who seek sanctions and attorneys who are charged with them. Together with Pavelic & Leflore v. Marvel Entertainment Group, No. 88-791 (O.T. 1989), this case presents this Court with its first opportunity since Rule 11 was amended in 1983 to consider the Rule's impact on federal court practice.

The Council is filing this brief to address two important questions concerning the administration of Rule 11: (1) the standard of appellate review of district court orders under Rule 11, and (2) the circumstances under which a party that receives an award of fees in the district court is entitled to an additional

award of fees incurred in successfully defending that award on appeal.1/

This brief is filed with the consent of both petitioner and respondent pursuant to this Court's Rule 36.2.

SUMMARY OF ARGUMENT

This brief amicus curiae is submitted in support of the holding of the United States Court of Appeals for the District of Columbia Circuit on the standard of appellate review. However, we

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1/ At the invitation of the United States Court of Appeals for the Seventh Circuit, the Council submitted an amicus brief and participated in oral argument in Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928 (7th Cir. 1989) (en banc) to address the first of these issues. There, as here, the Council argued for abuse of discretion as the standard of review in Rule 11 cases.

respectfully disagree with the approach taken by the court of appeals on appellate attorneys' fees.

1. Standard of Review. The appropriate standard of appellate review for a district court's award of Rule 11 sanctions is abuse of discretion. This standard should apply whether the decision under review awarded or denied sanctions, as the nature of the judicial inquiry is the same in either case. Moreover, this standard should apply under all Rule 11 branches, that is, whether the party seeking sanctions alleges that the paper signed is (a) not well grounded in fact, (b) not warranted by existing law, (c) not warranted by a good faith argument for the extension, modification, or reversal of existing law, or (d) interposed for an improper purpose. The first three branches of Rule 11 involve a decision as to whether the attorney filing a paper acted

reasonably under the circumstances. The concept of "reasonable inquiry" modifies all of these "objective" aspects of Rule 11. The fourth branch necessarily involves a factual inquiry into the filing attorney's purposes or intent in light of the litigation context.

Abuse of discretion is the standard best suited to appellate review for two reasons. First, the decision whether a filing violates Rule 11 requires the district court to determine whether counsel's inquiry or purpose was reasonable in light of the circumstances of the particular case and the litigation context. This is a judgment that the district court, by virtue of its experience with the litigation at hand and trial court practice generally, is far better positioned than the court of appeals to make. Second, although a primary function of appellate review is to provide rules that

minimize disparities among decisions by the district courts, the fact-intensive nature of Rule 11 decisions suggests that this is not an area to which appellate courts can expect to bring harmony through the promulgation of general rules. To the contrary, ill-fitting general rules may have the undesirable affect of chilling legitimate advocacy.

2. Fees on Appeal. Fees should not be awarded automatically to the prevailing party in a Rule 11 appeal. Such fee-shifting is contrary to the rule in most civil litigation. The appropriate mechanism for obtaining an award of appellate fees is Rule 38 of the Federal Rules of Appellate Procedure, which provides for an award of fees where an appeal is "frivolous." But it does not automatically follow that an appeal from a Rule 11 sanction is frivolous just because a district court has imposed sanctions.

Depending on the basis for the district court's ruling, the appeal may well raise substantial legal issues.

Moreover, this Court should not encourage satellite litigation under Rule 11 by creating incentives to bring Rule 11 motions where the economic damage is small. In such cases, as the court of appeals noted, the award may well be reduced to nothing by the costs of defending an appeal. But because the public and the bar perceive a Rule 11 sanction as a serious injury to the sanctioned attorney's reputation, a sanctioned attorney has a strong incentive to seek vindication through an appeal, even if the sanction award itself is small. The serious disproportionality of benefits and burdens to the parties discourages settlement and impedes finality in litigation.

Finally, some members of the bar and the judiciary may reasonably believe

that Rule 11 functions as a method of policing and improving standards of practice in the district courts. Thus, it may be argued that attorneys who bring Rule 11 motions, even where the economic damage is small, function as "private bar examiners" who should be rewarded through an award of fees on appeal. However, because Rule 11 motions accompany and influence other litigation, the incentives to bring Rule 11 motions cannot be depended upon to coincide with the public interest. Other existing mechanisms are better suited to address systemic failures among the bar.

ARGUMENT

I.
THE APPROPRIATE STANDARD OF APPELLATE REVIEW OF RULE 11 DECISIONS IS ABUSE OF DISCRETION.

The courts of appeals should review district court Rule 11 decisions under a highly deferential standard of review for two reasons. First, a deferential standard of review recognizes that district courts have more knowledge than the courts of appeal as to prevailing trial court practice and thus are better positioned to determine whether counsel acted reasonably under the circumstances. Second, the issues raised by most Rule 11 motions are fact specific. It would be a waste of judicial resources to undertake a searching review of the record in cases where the appellate courts are not likely to develop meaningful general rules to guide the district courts.

A. Deferential Review Is Appropriate Because The District Court Is Better Positioned To Determine Whether Counsel's Actions Have Been Reasonable Under The Relevant Circumstances.

Rule 11 provides, in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief formed after reasonable inquiry [the pleading, motion or other paper] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . .

The phrase "after reasonable inquiry" modifies all that follows. Thus the central issue faced by the district court in deciding a Rule 11 motion is "one of reasonableness under the circumstances." Fed. R. Civ. P. 11 (Advisory Committee Notes to 1983 Amendment); Brown v. National Board of Medical Examiners, 800 F.2d 168,

171 (7th Cir. 1986). As the Advisory Committee that drafted the 1983 Amendment recognized,

> what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Fed. R. Civ. P. 11 (Advisory Committee Notes to 1983 Amendment).

Rule 11's objective "reasonableness" standard is a familiar concept borrowed from the law of negligence. Hays v. Sony Corp., 847 F.2d 412, 418 (7th Cir. 1988); cf. The Germanic, 196 U.S. 589, 595-96 (1905); Seavey, Negligence -- Subjective or Objective? 41 Harv. L. Rev. 1, 3-5 (1927) (discussing "external" or "objective" test of negligence). The

reasonableness of any act or omission of counsel can only be assessed in light of the court's understanding of what reasonable counsel would have done when faced with the same resources, opportunities, information, and time. This inquiry is necessarily fact specific.[2/] And it is an inquiry that the district courts are much better qualified to make than the courts of appeal are positioned to review de novo, because the district courts are far better positioned to evaluate counsel's actions in the relevant litigation context.

This Court has recently reaffirmed that the selection of an appropriate standard of review frequently depends on

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2/ It goes without saying that an inquiry into counsel's "improper purpose," like any intent question, is fact specific. See, e.g., Rogers v. Lodge, 458 U.S. 613, 623 (1982) ("issues of intent are commonly treated as factual matters").

which judicial actor is "better positioned than another to decide the issue in question." Pierce v. Underwood, ___ U.S. ___, 108 S. Ct. 2541, 2547 (1988) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)). While not dispositive, this Court's decision in Pierce is highly persuasive authority that the abuse of discretion standard should apply under Rule 11.

In Pierce, this Court held that abuse of discretion was the appropriate standard of review of district courts' determinations that attorneys' fees should be awarded to private litigants pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A) in suits against the federal government. The EAJA provides that prevailing private litigants are entitled to fees "unless the court finds that the position of the United States was substantially justified." Id. In Pierce,

this Court held that the district court's determination as to whether a position was "substantially justified" merits "deferential, abuse-of-discretion review," 108 S. Ct. at 2547, for several reasons.

First, the district court "may have insights not conveyed by the record" that the district court obtains from its observation of and colloquy with the parties during pretrial activities and settlement conferences. Id.; cf. White v. Regester, 412 U.S. 755, 769-70 (1973) (applying deferential standard of review of district court finding of discrimination in voting-rights case based on the "special vantage point" of the district court in assessing the impact of local history on voting patterns); accord, Thornburg v. Gingles, 478 U.S. 30, 78-79 (1986). Moreover, even if the relevant facts could be found in the record, substantial judicial resources would be required to

undertake an "unaccustomed" review of the entire record for the collateral purpose of determining whether a losing position was substantially justified. Pierce, 108 S. Ct. at 2547.

Second, even if the issue appears to be purely legal -- i.e., if the private litigant alleges that the Government advanced an erroneous view of the law -- the true issue is "not what the law now is, but what the Government was substantially justified in believing it to have been." Id. at 2548. This initially involves an "historical" inquiry by the court into what the law was at the time the Government advanced its position. Id. Then the court must decide whether a given litigation position could have been substantially justified based on that state of the law. This unusual inquiry "will strongly distort the appellate process," id., because courts of appeal

typically decide what the law is, not how far off the mark a litigant's position was.

This Court's analysis in Pierce demonstrates that abuse of discretion is the proper standard of review in Rule 11 cases. Indeed, the district court's superior perspective is more evident in Rule 11 cases than in EAJA cases, because under Rule 11 the inquiry goes not to an overall litigation position but to a particular statement of law or fact in a particular filing. Time pressures and the availability of resources impact more severely upon a given filing than upon a long-term litigation strategy. These fact-bound issues are more relevant under Rule 11 than under the EAJA.

Moreover, judging whether a losing legal argument is "frivolous" is a question of degree. While it may be easy in the abstract to imagine paradigmatic

arguments that are frivolous on their face, legal arguments are not presented to courts in the abstract. An argument may be wrong but competent in one factual context and frivolous in another. The district court has the best view of the context.[3/] Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 934 (7th Cir. 1989) (en banc).

Thus, more persuasively under Rule 11 than under the EAJA, the district court is best situated, through its

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3/ Even accepting the often-argued proposition that the court of appeals is at no disadvantage in assessing whether an argument is legally frivolous, situations are rare in which the district court's superior perspective on the surrounding facts is irrelevant. The existence of these rare situations is not sufficiently compelling to justify carving out an exception to the general rule of deferential review. Even under a highly deferential standard, the court of appeals can correct the district court's salient errors.

familiarity with the case dynamics and the attorneys practicing before it, to apply the reasonableness standard and to make the relevant judgment call. That is because the district court has both a vertical and horizontal view of litigation that the court of appeals lacks and that the cold record cannot fully reflect.

The vertical dimension describes counsel's conduct in the given case. Appellate judges see attorneys in a limited and formal set of circumstances at a stage where the factual record has been crystallized and the legal issues narrowed. But practice in the trial courts involves frequent appearances by counsel during a case in widely varied procedural settings, such as motion practice, discovery disputes, status conferences, and settlement negotiations. Over time, the district judge overseeing the litigation develops an "intimate familiarity with the case,

the parties, and counsel, a familiarity [the court of appeals] cannot have." O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987). Through these experiences, the district judge develops a sense of counsel's credibility and candor, as well as the tactical and emotional dynamics that develop in the course of the litigation, that may be decisive in resolving disputed Rule 11 issues. Like any first-hand credibility determination, the district judge's feel for the case cannot fully appear of record and deserves substantial deference on appeal. See Pierce, 108 S. Ct. at 2547.

Perhaps more importantly, the district court also has a horizontal view of practice in the district. The district judge sees a wide variety of counsel and a wide variety of counsel on a daily basis. Thus, "the district court will have a better grasp of what is acceptable trial-

level practice among litigating members of the bar than will appellate judges." Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873 (5th Cir. 1988) (en banc). Having this perspective is what enables the judge to apply a "reasonableness" standard. By abandoning subjective bad faith as the sole basis for Rule 11 sanctions, the 1983 revisers desired to make Rule 11 "objective." Mars Steel, 880 F.2d at 932. Like all objective tort standards, "reasonable" means reasonable in relation to the behavior of a given population of attorneys. The district court sees that population every day and has the best insight into its standards of practice.[4/]

4/ To the extent that Rule 11's revisers may have intended to foster a national standard of acceptable practice in the federal courts, district judges are still

(Footnote Continued)

Because the court of appeals lacks the district court's vertical and horizontal perspectives of trial-court practice, it is poorly situated to second-guess the district court's informed judgment. De novo review would require the court of appeals to review the entire record and substitute its judgment for that of the district court. But the court of appeals cannot supply the specialized experience that informs the judgment. Deferential review thus provides the most appropriate allocation of judicial resources based on the district court's superior vantage point.

(Footnote Continued)
better situated than appellate judges to judge standards of practice in their own courts. Moreover, Rule 11 is a very blunt tool with which to fashion federal practice standards, because it depends on the motivation of isolated private litigants, not the considered collective views of bench and bar.

B. Deferential Review Is Appropriate Because Rule 11 Cases Are Fact Bound, And Intensive Appellate Scrutiny Will Not Yield Useful General Rules To Guide The District Courts.

An important function of appellate review is the formulation of rules to guide the district courts. But as this Court noted in Pierce, deferential review is appropriate where the questions likely to be litigated are "multifarious and novel" and "little susceptible, for the time being, at least, of useful generalization." 108 S. Ct. at 2548; see also Mars Steel, 880 F.2d at 933 ("Fact-intensive disputes, those whose resolution is unlikely to establish rules of future conduct, are reviewed under a deferential standard because the role of appellate courts in establishing and articulating rules of law is not at stake.").

Deferential review will not prevent the development of rules to guide the district courts. As this Court noted in Pierce, the abuse of discretion standard permits rules to develop in light of experience. 108 S. Ct. at 2548. Because Rule 11 cases are fact specific, it is dangerous to generalize from the facts of a single case. But over time, fact patterns and repeated types of abuse may emerge and become appropriate subjects for appellate rulemaking.

On the other hand, de novo review would have the effect of establishing "multifarious" rules of law in collateral proceedings. Again, in Pierce, this Court observed that the question whether a legal position is unreasonable may often arise after the case on the merits has been settled or dismissed, thus in effect forcing the court of appeals to render an advisory opinion. 108 S. Ct. at 2548.

And if the law is unclear, de novo review will settle the substantive legal question collaterally, a process this Court described as "a most peculiar, second-handed fashion" of deciding points of law. 108 S. Ct. at 2548.

Rule 11 cases are highly fact specific. Whether counsel's investigation was reasonable, or whether his or her purpose was improper, can turn on the complexity of the facts to be investigated and the legal issues implicated, the clarity of the legal rules at issue, the time available for investigation, the research tools and investigative resources available to counsel and reasonably affordable by the client, and the reputation of co-counsel for reliability in supplying factual and legal research. See Fed. R. Civ. P. 11 (Advisory Committee Notes to 1983 Amendment). For this reason several courts of appeal, including two en

banc courts, have adopted an abuse of discretion standard of review in Rule 11 cases. See, e.g., Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 936 (1989) (en banc); Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873 (5th Cir. 1988) (en banc); see also Shaffer, Introduction: Rule 11: Bright Light, Dim Future, in American Bar Association Section of Litigation, Sanctions: Rule 11 and Other Powers at 1, 15 (2d ed. 1988) (recommending adoption of the abuse of discretion standard).

Where cases are fact specific, the decision of a court of appeals becomes, as Justice Roberts once said in a different context, "a restricted railroad ticket, good for this day and train only." Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). A searching standard of review that requires the court of appeals to canvass the entire record de

novo is therefore a waste of judicial resources. Thus, this Court has adopted a deferential standard of review in cases that tend to turn on particularized fact patterns that do not afford the opportunity for meaningful appellate generalization. Pierce, 108 S. Ct. at 2548; see also Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) (determination whether a fishing-boat employee had the characteristics of a "seaman" pursuant to 29 U.S.C. § 213(b)(6)); Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 10-11 (1980) (certification of final order under Fed. R. Civ. P. 54(b)).

It is frequently argued that, even if the court of appeals cannot establish meaningful appellate guidelines in fact-specific Rule 11 cases, de novo review is necessary to ensure fairness to attorneys stigmatized by a Rule 11 sanction. But lawyers have no special claim

to protection from stigma. The loser in a medical or accounting malpractice case faces considerable personal and professional stigma. Yet appellate courts do not apply a searching standard of review to protect those losers' sensibilities, professional reputations, or careers. See Mars Steel, 880 F.2d at 936. While all courts have a special interest in maintaining standards of legal practice, it ill behooves lawyers to claim a special privilege of review not afforded to other persons or professions.

In sum, the abuse of discretion standard of review is best suited to both the relative expertise of the trial and appellate courts and the sui generis nature of Rule 11 litigation. This Court should affirm the application of that standard in Rule 11 cases.

II.
THE PREVAILING APPELLEE IN RULE 11 CASES SHOULD NOT AUTOMATICALLY RECEIVE AN AWARD OF ATTORNEYS' FEES ON APPEAL.

The court of appeals below remanded to the district court so that the district court could enter "an appropriate award" under Rule 11 to cover the appellee's attorneys' fees incurred in the appeal, thus creating an automatic entitlement to fee shifting in the successful defense of a Rule 11 award. Danik, Inc. v. Hartmarx Corp., 875 F.2d 890, 898 (D.C. Cir. 1989). The court expressly declined to award fees pursuant to Fed. R. App. P. 38, which provides for an award of fees on appeal only if the appeal is "frivolous." Id. 875 F.2d at 897. Instead, the court determined that the appellate attorneys' fees of a party that successfully defends a Rule 11 award on appeal should automatically receive reimbursement of those fees because the fees were "'incurred because

of' the filing for which sanctions [were] imposed by the district court." Id., quoting Fed. R. Civ. P. 11.

This approach creates an unjustifiably unique rule for fee shifting on appeal and circumvents the plain language of Fed. R. App. P. 38. Moreover, the court of appeals' approach will increase satellite Rule 11 litigation at the district court level without significantly enhancing the systemic benefits Rule 11 was meant to address.

A. Rule 11 Litigation Is Not Subject To A Special Fee Shifting Rule On Appeal.

The court of appeals held that a party that successfully defends a Rule 11 award on appeal must automatically be entitled to appellate attorneys' fees because the costs of defending an appeal might exceed the amount of the Rule 11

award, "thus forcing many litigants in appellant's position to conclude that the vindication of the Rule 11 interests is not worth the candle." Danik, Inc. v. Hartmarx Corp., 875 F.2d at 897 (quoting Westmoreland v. CBS, Inc., 770 F.2d 1168, 1179 (D.C. Cir. 1985)). While this argument has surface appeal, it proves far too much. The same reasoning would apply to a party that receives a proportionally small award in a personal injury or medical malpractice case. Thus, strictly from the viewpoint of the party's financial interests, there is no general rule that the party's trial-court award must be protected against erosion by the expense of attorneys' fees in defending an appeal.5/

5/ Indeed, Congress has made express provision to protect a successful appellee

(Footnote Continued)

The rule governing fees on appeal to a court of appeals is Fed. R. App. P. 38, which provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

"Damages" under Rule 38 include attorneys' fees. See Fed. R. App. P. 38 (Advisory Committee Notes). But by its express terms, the prerequisite to a fee award under Rule 38 is a finding that the appeal is frivolous. See, e.g., United Steelworkers of America v. Danly Machine Corp., 852 F.2d 1024, 1028 (7th Cir. 1988) (declining to impose Rule 38 sanctions where appeal, although "unnecessary" and

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(Footnote Continued)
against statutorily defined "costs" of appeal and the interest loss caused by a delay in obtaining judgment. 28 U.S.C. § 1912. By obvious implication, Congress has made no provision for protection against the expense of attorneys' fees.

"waste[ful]," "had credence"); Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743, 753 (8th Cir.) (losing appeal not frivolous under Rule 38 where issues "were not and are not entirely settled"), cert. denied, 476 U.S. 1141 (1986).

The merits of an appeal are wholly separate from the question whether a pleading, motion, or other paper filed in the district court was frivolous. An appeal from an award of Rule 11 sanctions may well raise substantial legal issues and not itself be frivolous. Certainly there is no basis for holding that such appeals are presumptively frivolous.

The approach taken by the court of appeals below evades Rule 38. Indeed, if fees on appeal should be awarded pursuant to Rule 11 itself as consequential damages, logic requires that fees should be awarded for the costs of any further

proceedings in this Court as well, including both the expense of responding to a petition for a writ of certiorari and proceedings on the merits if certiorari is granted. That is, while Rule 38 applies only to fees in the courts of appeals, the "consequential damages" approach applies to all fees incurred in defending the award, including fees in this Court. Thus, even in a case where this Court has granted certiorari because the certiorari petition raises important legal questions and is not frivolous, an unsuccessful petitioner would still be required to pay the respondent's attorney's fees here.

To be sure, Rule 11 expresses a public as well as a private interest -- the public interest in deterring frivolous litigation. Thus, the court of appeals below apparently thought that the appellee was entitled to fees for "vindication of the Rule 11 interests." Danik, Inc. v.

Hartmarx Corp., 875 F.2d at 897. But the remand process imposed by the court of appeals prolongs satellite litigation, delays finality, and undesirably multiplies the cost of litigation over a collateral matter. Indeed, it can be predicted with some assurance that a remand to award fees would be followed by an appeal challenging the amount of the award. The public interest in deterring frivolous litigation must therefore be weighed against the public interest in avoiding court dockets clogged with litigation over fees. See Talamini v. Allstate Insurance Co., 470 U.S. 1067, 1069 (1985) (plurality opinion).

Congress and the Advisory Committees that draft the Rules know how to provide for appellate fees when they think a party is entitled to compensation for vindicating federal interests. Congress has expressly provided for an award of fees in any federal court where

an attorney "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. But no statute or rule governing appeals expressly provides for an award of attorneys' fees on appeal solely because a position taken in the district court was found to be frivolous.[6/] If Congress or the Advisory Committee had thought they were creating such a rule, surely their draftsmanship would have been more explicit.[7/]

6/ Several fee-shifting statutes enacted by Congress expressly provide appellate attorneys' fees to prevailing parties without a need to make the additional showing that the loser's position was frivolous. See, e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415-16 (1978). These statutes are the sole source of the federal courts' pure fee-shifting powers. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 262 (1975).

7/ We understand that the Advisory Committee on the Federal Rules of Appellate

(Footnote Continued)

The general rule in federal courts is that the parties bear their own attorneys' fees. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). As this Court observed in Alyeska Pipeline, Congress has not extended

> any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.

421 U.S. at 260 (footnote omitted). The circumstances under which attorneys' fees may be granted are "matters for Congress to determine." Id., 421 U.S. at 262.

(Footnote Continued)
Procedure is considering revisions to Rule 38. In any event, the Committee and Congress are the appropriate forums for rulemaking on appellate fees.

Congress has not determined that a Rule 11 appellee should receive fees as a matter of course absent the showing required by Rule 38 or Section 1927. The court of appeals below reached its determination as a construction of the text of Rule 11. But the existence of Rule 38 as the distinct Rule governing fee awards on appeal is dispositive evidence that the 1983 Rule 11 revisers and Congress did not intend the construction reached by the court of appeals.

Moreover, the court of appeals' construction of Rule 11's text offers less than meets the eye. The court of appeals held that the costs of defending an appeal are costs that are necessarily "incurred because of the filing of the pleading, motion, or other paper" in the district court. Danik, Inc. v. Hartmarx Corp., 875 F.2d at 898. In other words, had the sanctioned attorney not filed a frivolous

pleading, there would be no sanctions award from which to appeal.

This "for want of a nail" approach assumes that the district court, in awarding the sanctions, made no close judgment calls suggesting the possibility of a successful appeal. But where the district court has relied on debatable grounds, the "cause" of the appeal is, in a real sense, the district court's ruling, not the original filing. That is, in traditional tort concepts, the district court's ruling may well be an intervening cause that should limit the sanctioned attorney's further liability. The court of appeals cannot decide whether the appellee's fees were "incurred because of" the Rule 11 violation unless it first decides whether the appeal itself is frivolous.

Rule 11 itself gives the courts of appeals no direct authority to award

fees, as even the court of appeals here recognized. Danik, Inc. v. Hartmarx Corp., 875 F.2d at 898; see also Hays, 847 F.2d at 420. But by remanding to the district court with directions to enter an award of appellate attorneys' fees the court of appeals both avoided Rule 38 and Section 1927, under which it had power to award fees, and did indirectly under Rule 11 what it conceded it could not do directly. This Court should repudiate that approach, which has not been sanctioned by Congress and is itself disingenuous.

B. An Automatic Award Of Fees To The Successful Rule 11 Appellee Will Encourage Satellite Litigation Without Promoting Higher Standards Of Federal Practice.

The court of appeals was concerned that if the costs of defending an appeal exceed the amount of attorneys' fees awarded by the district court, an attorney might find that vindicating the award is "not worth the candle." Danik, Inc. v. Hartmarx Corp., 875 F.2d at 897. But this is only to be expected where a party brings a motion to redress a small economic loss. A party winning a small judgment in a contract or negligence case might well be expected to settle or abandon a case where the costs of defending an appeal will exceed the judgment. For the same reason, a party against whom a small judgment is assessed would be expected to pay the judgment or settle rather than mount an expensive appeal.

Rule 11 does not work that way. Attorneys sanctioned under Rule 11 frequently take the fact of the sanction more seriously than the amount of the award. See, e.g., Mars Steel, 880 F.2d at 931 (en banc appeal of sanction totalling $1,648); Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1540-41 (9th Cir. 1986). Thus, an attorney is likely to appeal to vindicate his or her reputation even if the cost of the appeal exceeds the dollar amount of the award. In other words, the cost of a sanction to the sanctioned attorney may substantially exceed the cost of the frivolous filing to the party seeking sanctions. This disproportionate impact will necessarily lead to appeals that are not cost-effective from the appellee's perspective.

This disparity of burdens is unique to Rule 11 cases. For example, although Rule 11 motions have been

analogized to a malpractice actions, see, e.g., Hays, 847 F.2d at 418, a party normally would not bring a medical or legal malpractice action as an original matter unless the prospect of substantial damages made the suit worthwhile. But Rule 11 motions, which by definition arise in the context of ongoing litigation, apparently require no such cost/benefit justification to bring and for some litigants may be made as a matter of course.

An automatic award of fees to a prevailing Rule 11 appellee thus provides a significant incentive to bring Rule 11 motions. But while Rule 11 was no doubt intended to serve the public interest in deterring frivolous litigation, no special incentives are needed to encourage Rule 11 motions that otherwise would not be brought, nor can such incentives be justified.

First, as noted above, parties making Rule 11 motions face no significant cost/benefit hurdle at the outset. While an injured party normally has to convince an attorney that the prospective judgment will be greater than the costs of suit, a party already involved in a suit will normally regard the cost of bringing a Rule 11 motion as incidental.

Second, because Rule 11 motions are incidental to the underlying dispute, they are not infrequently brought as part of an overall strategy in the underlying litigation. Attorneys who bring Rule 11 motions frequently perceive benefits to their overall litigation position through the threat value of the sanction. Thus, the benefit to the moving party is not necessarily limited to the cash value of the sanction. The motion itself, even if not ruled upon, may ultimately be a factor in gaining settlement or voluntary

dismissal of the case on the merits. That in itself is a substantial incentive to bring a Rule 11 motion

Third, attorney-fee shifting in derogation of the general "American Rule" generally arises where Congress has perceived a need to encourage "private attorneys general" in vindicating federal rights that otherwise would have to be vindicated by the federal government. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978); Alyeska Pipeline, 421 U.S. at 263. Congress has made no finding that Rule 11 serves this purpose. Nor, given the strategic context in which Rule 11 motions arise, is a private enforcement mechanism the most effective or appropriate manner in which to regulate the legal profession.

Fourth, if an appeal raises no issues of substance, the cost to the appellee in responding ought to be minimal,

and if the sanctions award is small, the appellee normally should be discouraged from incurring substantial attorneys' fees to defend it. This Court should not encourage the churning of attorneys' fees by creating an incentive to appellees to spend substantial time in responding to appeals in a non-cost-effective manner.[8/]

Fifth, the automatic fee-shifting rule created by the court of appeals below creates incentives only to bring Rule 11

8/ On the other hand, a party awarded a small Rule 11 sanction may have a strong incentive to protect that sanction if the party is frequently the target of an identifiable class of frivolous suits. In such cases, the long-term benefit to the party in establishing that a certain type of suit is frivolous outweighs the cash value of the sanction in the particular case, and there is no reason to lament the erosion of that cash value in the appeal. Presumably a party knows whether an investment of its resources in defending a sanction is worthwhile. Automatic fee shifting removes the appellee's responsibility for making such an evaluation and promotes waste.

motions. It promotes no caution in the sanction-seeking process. Under the rule announced below, a party that successfully defends a Rule 11 award is automatically entitled to appellate fees, as, apparently, is a party denied Rule 11 sanctions in the district court but that obtains a reversal in the court of appeals. Danik, Inc. v. Hartmarx Corp., 875 F.2d at 897 (citing Westmoreland v. CBS, Inc., 770 F.2d 1168, 1179 (D.C. Cir. 1985). But a party that is sanctioned by the district court and wins reversal on appeal, or a party not sanctioned by the district court that successfully defends the denial on appeal, is not entitled to appellate fees (unless, of course, the appeal is frivolous under Rule 38). While in the context of civil rights cases an unequal standard for the award of attorneys' fees is justified by "a policy that Congress considered of the highest priority," Christiansburg Garment,

434 U.S. at 418, no such high-priority policy has been articulated under Rule 11. Indeed, the articulation through the Federal Rules of Civil Procedure of policies favoring a particular class of litigants is contrary to the Rules Enabling Act, 28 U.S.C. § 2072(b) (rules "shall not abridge, enlarge or modify any substantive right"). Cf. Marek v. Chesny, 473 U.S. 1, 10 (1985) (fee shifting under Fed. R. Civ. P. 68 is "neutral, favoring neither plaintiffs nor defendants").

Finally, automatic fee shifting on appeal has a chilling effect on creative litigation. Rule 11 was not meant to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Fed. R. Civ. P. 11 (Advisory Committee Notes to 1983 Amendment). So long as liability for fees is judged by the frivolousness standard, an attorney can protect himself or herself by meeting the

reasonable inquiry requirement. But if appellate fees are automatically assessed solely on the "loser pays" principle, an attorney cannot avoid liability even where the appeal raises significant legal issues. This substantially increased strict liability exposure will chill both attorneys and their clients, who in some cases may end up paying the fees.

In sum, the problem identified and sought to be remedied by the court of appeals is inherent in the nature of Rule 11 litigation. It is obvious to anyone giving Rule 11 a moment's thought. Yet neither the 1983 revisers nor Congress has seen fit to remedy the problem, and for good reason. A remedy is neither wise nor necessary. All the relief needed is provided by Rule 38 and 28 U.S.C. § 1927. These provisions should not be ignored in favor of a specious interpretation of Rule 11 itself.

CONCLUSION

For all of the reasons stated above, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed as to the original award of sanctions by the district court but reversed as to the additional award of attorneys' fees incurred on appeal.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

Case No. 89-275

October Term, 1989

COOTER & GELL, PETITIONERS,

v.

HARTMARX CORPORATION, ET AL.,
RESPONDENTS.

BRIEF OF PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE

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On Behalf of the Plaintiff
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QUESTIONS PRESENTED

Amicus will address the following issues:

1. Whether review of Rule 11 sanctions under an "abuse of discretion" standard is appropriate for all issues; and

2. Whether a court of appeals can automatically impose Rule 11 sanctions on appeal upon affirmance of a Rule 11 award.

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RESPONDENTS.

BRIEF OF PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE

The Plaintiff Employment Lawyers Association (PELA) hereby submits the following Brief Amicus Curiae in this case.

STATEMENT OF INTEREST

PELA is a nonprofit organization, consisting of over 750 lawyers in forty-nine states. Its members specialize in the representation of individual employees in employment and labor matters, including cases alleging employment discrimination under one or more of the various federal and state fair employment statutes. Members of PELA also are active in litigating claims in federal and state courts in the rapidly changing area of wrongful discharge claims.

Amicus is concerned over the interpretation and application given by some courts to amended Rule 11, Fed.R.Civ.P. There is strong evidence that Rule 11 is being administered in a disproportionate manner, especially in civil rights cases. These Rule 11 fee awards have a chilling effect on the representation of persons who believe that their civil rights or other employment rights have been violated.

Two recent empirical studies support Amicus's concern. A survey of the published Rule 11 decisions found that the plaintiff was the target of the sanctions motion in 78.8% of the cases in

which sanctions were requested, and that plaintiffs were sanctioned in 59.6% of the cases in which they were the target. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988). This same study found that plaintiffs were the target of the sanctions request in 86.4% of civil rights and employment discrimination cases in which Rule 11 sanctions were requested,[1] which is somewhat higher than the 78.8% representation of plaintiffs in the overall sample. However, civil-rights and employment-discrimination plaintiffs "are sanctioned in 71.5% of the cases in which they are the target, a figure that is a full 17.3% higher than the average for plaintiffs in all other cases (54.2%)." *Id.* at 200-01.

A more recent empirical study examined both published and unpublished Rule 11 decisions in the Third Circuit. American Judicature Society, *Rule 11 in Transition: A Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (1989). This study found that, while requests for sanctions in civil rights cases occurred at only a slightly higher rate (18.2%) then would be expected on the basis of civil filings in that circuit (16%), plaintiffs and/or their counsel were sanctioned on motion in civil rights and employment discrimination cases at a rate (47.1%) that was considerably higher than the rate (8.45%) for plaintiffs in non-civil rights cases.[2] *Id.* at 69. This disparity persisted even after uncounseled *pro se* plaintiffs were excluded: counseled civil rights plaintiffs in that survey were sanctioned on motion at a rate (45.5%) far higher than the rate for counseled plaintiffs in non-civil rights cases (8.7%), "a difference that is statistically significant at a level of less that one percent." *Id.* at 71.

Rule 11 has become a major cause of concern for litigants in the area of employment and labor law. The availability of these sanctions significantly increases the financial risks faced by plaintiffs' counsel. Further, as will be explained more fully in this Brief, sanctions have been imposed on an inconsistent and sometimes arbitrary basis. The financial penalties and stigmatization

[1] That statistic does not include tax protest cases brought *pro se* or by represented parties. *Id.* at 200 n. 60.

[2] This study found that this latter disparity was statistically significant at a level of less than one percent. *Id.* at 69 n.19.

resulting from Rule 11 sanctions make employment and labor law, with its oft-shifting legal standards,[3] so risky as to cause many practitioners to decide to abandon this area of their practice. The result is that a Rule intended to deter abusive behavior is making it more difficult for persons to vindicate their rights in this important area of the law.

ARGUMENT

I. APPELLATE REVIEW OF THE MIXED LEGAL-FACTUAL QUESTION OF WHETHER A PARTY HAS MADE AN ADEQUATE PRE-FILING INQUIRY SHOULD BE REVIEWED ON APPEAL ON A *DE NOVO* BASIS.

This case involves the adequacy of the pre-filing inquiry done by counsel for the plaintiff in an antitrust class action. The import of this Court's decision in this case will extend beyond the factual setting in which it arose. This Court should be careful to articulate legal standards that are sensitive to the differences in the varying types of federal litigation. Moreover, this Court's opinion in this case also will affect decisions in state courts, given the frequency with which various states have adopted their own versions of the 1983 amendment to federal Rule 11.[4]

In order to discuss appellate review, it is necessary to understand exactly what is being reviewed. In this case, the question

[3] In its last term, this Court handed down a number of decisions in cases brought under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. §1981, changing the law articulated in prior opinions of this Court or in a number of circuit court decisions. *See, e.g., Wards Cove Packing Co., Inc v. Atonio*, ____ U.S.____, 109 S.Ct. 2105 (1989); *Patterson v. McLean Credit Union*, ____ U.S. ____, 109 S.Ct. 2363 (1989); *Jett v. Dallas Independent School Dist.*, ____ U.S. ____, 109 S.Ct. 2702 (1989).

[4] Alaska Civ.R. 11; Ariz.R.Civ.P. 11; Ark.R.Civ.P. 11; Colo.R.Civ.P. 11; Idaho R.Civ.P. 11; Kan.Stat.Ann. §60-211 (1988); Ky.R.Civ.P. 11; Mich.Ct.R. 214(D) and (E); Minn.R.Ct. 11; Mo.R.Civ.P. 55.03; Mont.Code Ann., T. 25, ch. 20, R. 11 (1988); Nev.R.Civ.P. 11; N.C.R.Civ.P. 11; N.D.R.Civ.P. 11; 12 Okla.Stat.Ann. §2011 (1988); Ore.R.Civ.P. 11; S.D.Cod. Laws §15-6-11 (1988); Tenn.R.Civ.P. 11; Utah R.Civ.P. 11; Wash.Civ.R. 11; W.Va.R.Civ.P. 11; Wis.Civ.P.R. 802.05(1)(a).

is whether Petitioner satisfied its obligation under Rule 11 that, by signing a pleading, it certified to the best of its "knowledge, information, and belief formed after reasonable inquiry [that the pleading] is well grounded in fact..."

The Advisory Committee described the "reasonable inquiry" standard under amended Rule 11 as being one of "reasonableness under the circumstances," a standard that "is more stringent than the original good-faith formula..." Advisory Committee's Note to 1983 Amendment to Rule 11, 97 F.R.D. 165, 198-99 (1983).[5] The committee included strong cautionary language (97 F.R.D. at 199):

> The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Rule 11 should be applied with particular caution in employment cases. Evidence of discriminatory intent or other actionable motives generally is circumstantial. To prove liability, it may be necessary to present the testimony of many witnesses and introduce a large number of documents into evidence. The development of a party's case often evolves during pretrial discovery, as each party obtains more information about the plaintiff and the decision-makers, as the plaintiff learns more of the company's

[5] Before the 1983 amendment to Rule 11, that Rule stated that the signature of an attorney on a pleading constituted a certificate that the best of the attorney's "knowledge, information and belief there is good ground to support it, and that it is not interposed for delay." The new requirement of "reasonable inquiry" imposes a duty on the attorney "for some pre-filing inquiry into both the facts and the law..." Advisory Committee's Note, 97 F.R.D. at 198 (1983).

view of his or her work history, and as the parties obtain and interpret comparative data concerning other employees.

Prior to filing a lawsuit, few potential plaintiffs (except those in high-level executive positions) know all or even most of the facts necessary to establish liability. The plaintiff's attorney will be able to learn the names of potential witnesses, but will be unable to interview current supervisory employees and possibly other witnesses because of ethical constraints. DR 7-104(A)(1). Other witnesses, particularly persons still employed by the company that the attorney intends to sue, may be reluctant to cooperate out of fear of retaliation. Moreover, most of the documents necessary to establish liability generally will be in company's sole possession. *See, e.g., Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1002, 1012 (2d Cir. 1986). As a result, an attorney representing a plaintiff in an employment case often can conduct only a limited pre-filing inquiry because of the inherent difficulties of obtaining useful information without discovery.

Some courts have been sensitive to the difficulties of obtaining comprehensive information in civil rights and employment cases before a lawsuit is filed. In a police misconduct case filed under 42 U.S.C. §1983, the Second Circuit concluded that neither plaintiffs nor their attorneys need obtain, before commencing suit, "the detailed information needed to prove a pattern of supervisory misconduct in the form of inadequate training, improper policies, and toleration of unconstitutional actions by individual police officers. A plaintiff does not have to be prepared to meet a summary judgment motion as soon as the complaint is filed." *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). *See also Morda v. Klein*, 865 F.2d 782, 785-86 (6th Cir. 1989)("It would be particularly difficult to fault plaintiffs for a lack of a prefiling inquiry when, as here, defendants have refused plaintiffs access to material information that would bear on certain allegations made in the complaint.")

Other courts have rushed to sanction plaintiffs and their attorneys, ignoring facts that established the inappropriateness of those sanctions. For example, in *Cabell v. Petty*, 810 F.2d 463 (4th Cir. 1987), the Fourth Circuit reversed the district court's decision

to deny a Rule 11 motion against the plaintiff's attorney, concluding that "counsel's statements at oral argument indicate that the action was filed in a speculative effort to find someone financially liable for plaintiff's injuries before the statute of limitations expired." *Id.* at 466. However, the majority of the appellate panel ignored the fact that the plaintiffs' attorney had to file the complaint under severe time constraints; that, at the time of filing, the attorney had reasonable grounds to believe that he could establish liability; and that the plaintiffs' attorney faced significant difficulties in uncovering the facts in that case. *Id.* at 467 (Butzner, J., dissenting).

Similarly, the Seventh Circuit reversed a district court's decision not to impose Rule 11 sanctions, reaching beyond the record to speculate that the plaintiff may have failed to conduct an adequate pre-filing inquiry or may have filed its complaint in bad faith. *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082-83 (7th Cir. 1987). The majority opinion noted that the defendant "believes" the plaintiff had conducted no pre-filing inquiry and concluded that "[p]erhaps" the plaintiff had filed the lawsuit for an improper reason. *Id.* at 1082. All of this caused Judge Cudahy to dissent on the ground that the approach used in the majority opinion "effectively transforms Rule 11 from a protector against frivolous litigation, a boon to the parties and the courts, into a fomentor of derivative litigation, a mire for unwary parties and overzealous courts." *Id.* at 1085.

The inconsistency in the way in which the different circuit courts of appeal treat the Rule 11 pre-filing inquiry requirement is troubling to litigators, who face a difficult enough problem anticipating the differing standards used by district court judges in evaluating the sufficiency of their efforts to investigate the merits of their clients' cases before they have had an opportunity to commence discovery. Attorneys in some circuits should not have to deal with the additional burden of appellate courts willing to twist the facts in order to impose sanctions.

The potential for abuse at the district-court level makes it imperative that these decisions be reviewed in a careful fashion. For that reason, Amicus believes that this Court should reject the deferential across-the-board abuse of discretion standard adopted

by some circuits. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc); *O'Connell v. Champion Internat'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987); *EBI, Inc. v. Gator Industries, Inc.*, 807 F.2d 1, 6 (1st Cir. 1986); *Stevens v. Lawyers Mutual Liability Ins. Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986); *Lieb v. Topstone Industries Inc.*, 788 F.2d 151, 157 (3d Cir. 1986); *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1887 (10th Cir. 1985). Amicus also urges this Court to reject the approach followed in other circuits, which apply an abuse of discretion standard of review on the issue of the adequacy of a pre-filing inquiry.[6] *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1175 (D.C.Cir. 1985); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985), *cert. denied*, ____ U.S. ____, 108 S.Ct. 269 (1987).[7]

Instead, this Court should adopt the analysis used by the Eighth and Ninth Circuits. *Kurkowski v. Volcker*, 819 F.2d 201, 203 n. 8 (8th Cir. 1987); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). The *Zaldivar* opinion described that standard of review as follows (780 F.2d at 828):

> Appellate review of orders imposing sanctions under Rule 11 may require a number of separate inquiries. If the facts relied upon by the district court to establish a violation of the Rule are disputed on appeal, we review the factual determination of the district court under a clearly erroneous standard. If the legal conclusion of the district court that the facts constitute a violation of the Rule is disputed, we review that legal conclusion *de novo*. Finally, if the appropriateness of the sanction imposed is challenged,

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[6] This approach does have the advantage of reviewing the legal issue of the adequacy of a party's legal arguments on a *de novo* basis. See discussion *infra* at 8, n. 8.

[7] *De novo* review in this case could have affected the outcome on appeal. Amicus understands that Petitioner's Opening Brief will set forth facts not discussed in the opinions below, including its corroboration of the client's price-discrimination allegations through a deposition in a related case and the refusal of Respondents' General Counsel to discuss the proposed complaint in this case with Petitioner, even after having been provided a draft of that complaint.

we review the sanction under an abuse of discretion standard.

This three-tiered approach recognizes the different types of issues that may arise in a Rule 11 appeal, and applies traditional legal standards to the resolution of those issues. Where the underlying facts are in dispute, appellate courts should not reverse the district court's resolution of that controversy unless its decision was clearly erroneous. Rule 52(a), Fed.R.Civ.P.; *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). And where a party contends the district court erred in its choice of sanctions, appellate courts should apply the same abuse of discretion standard they apply to similar controversies. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

The second of these three issues – whether specific facts justify the imposition of sanctions – presents a mixed issue of law and fact. In particular, the court must reach a legal conclusion of the minimal requirements for an attorney's investigation of a particular case, given both the unique circumstances of that case and the legal tests of liability. The appellate court need not determine the credibility of witnesses or apply any of the usual burdens of persuasion in order to review the district court's determination on this issue. As a result, this question should be reviewed on a *de novo* basis.[8]

Where there exist factual disputes on which First Amendment rights turn, this Court applies a *de novo* standard of review in order to "make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)(quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). This standard is used in both defamation and employment cases. *Connick v. Myers*, 461 U.S. 138, 148 n. 7 (1983). Imposition of Rule 11 sanctions on both plaintiffs and their attorneys can chill the exercise of the First Amendment right of access to the courts[9] as effectively as defamation suits and disciplinary action by public employers can chill other forms of protected expression. A *de novo* standard of review is as necessary here as in these other settings.

In reviewing a district court's determination *not* to impose sanctions, an appellate court must be careful not to be more zealous in applying Rule 11 than was the district court. One of the purposes of appellate review of Rule 11 sanction motions is to ensure that a district court judge does not impose sanctions out of frustration with a protracted lawsuit in which the facts and/or the law predominate in favor of one party. An appellate court must make sure that the district court did not use hindsight logic in declaring that a losing party and/or attorney should have known from the outset that the case lacked any legal or factual basis.

Different considerations apply to a decision not to impose sanctions. That type of decision is unlikely to involve an emotional reaction by the district court to a difficult case. Under these circumstances, an appellate court should hesitate before substituting its legal judgment that a party or attorney had engaged in sanctionable behavior. It should never engage in speculation that a party may have acted improperly or a for a bad motive. *Szabo, supra.* Overly zealous appellate court review of a denial of sanctions undermines the underlying purpose of Rule 11 to punish clearly frivolous or abusive behavior, without at the same time chilling "an attorney's enthusiasm or creativity in pursuing factual or legal theories." Advisory Committee's Note, 97 F.R.D. at 199.[10]

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[8] This standard of review is even more crucial for a determination that an attorney submitted a pleading, motion or other paper that was not "warranted by existing law or a good faith argument for the extension, modification, or reversal of an existing law..." Rule 11, Fed.R.Civ.P. That issue involves purely legal issues, or nearly so. An appellate court is in the same position as a district court to test the adequacy of an attorney's or party's legal arguments.

[9] *Bounds v. Smith*, 430 U.S. 817, 828 (1977) characterized the right of access to the courts as a "fundamental constitutional right." *See also Boddie v. Connecticut*, 401 U.S. 371 (1971); *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361, 1364-69 (Colo. 1984) and decisions cited therein.

[10] It is appropriate for this Court to impose differential standards of review of decisions not to oppose sanctions as opposed to decisions to oppose Rule 11 sanctions. This Court has imposed differential standards of proof when necessary to effectuate important public policies. *See, e.g., Christiansburg Garment Co. v. EEOC*, 422 U.S. 405 (1975). Of course, this standard would apply both

II. ATTORNEY FEES FOR AN UNSUCCESSFUL RULE 11 APPEAL SHOULD BE AWARDED ONLY IF THE APPEAL ITSELF WAS FRIVOLOUS.

The court of appeals in the case concluded that Respondents were entitled to an award of attorney's fees on appeal, without a finding that the appeal itself was frivolous. *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 897 (D.C. Cir. 1989). The court relied on its earlier decision in *Westmoreland*, 770 F.2d at 1179, in which it had concluded that a party who successfully challenged a denial of sanctions was entitled to attorneys' fees on appeal as part of "the reasonable expenses incurred" as a result of the filing of a pleading, motion, or other paper in violation of Rule 11.

This precedent is an extremely dangerous one, and should be reversed by this Court. Imposition of Rule 11 sanctions on an attorney or a law firm inevitably will have a stigmatizing effect. It constitutes a judicial declaration that an attorney has engaged in extremely unprofessional conduct. Such a decision can be cited in later cases brought by the same attorney or firm, in an effort to obtain sanctions in another case or to engage in an *ad hominem* attack. These consequences can be as serious or more serious than the actual financial penalties.[11]

Because of the seriousness of Rule 11 sanctions, it is crucial that parties and their attorneys not be deterred from obtaining appellate review of such decisions. The court of appeals' decision will have precisely this effect. A party or attorney on whom sanctions have been imposed would have to weigh the possible additional penalties of paying not only for that party's or attorney's appeal, but also for the appellate attorneys' fees of opposing counsel. These potential additional penalties will create a powerful disincentive against appellate review, even in cases in which the sanctioned party or attorney has a legitimate argument that the district

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to plaintiffs and to defendants appealing a district court's decision not to impose sanctions. Cf. *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1162-63 (9th Cir. 1987).

[11] That is not to minimize the fiscal impact of a large Rule 11 award. In at least one case, fees and costs awarded under Rule 11 exceeded one million dollars. *Avirgan v. Hull*, 705 F.Supp. 1544 (S.D.Fla. 1989).

court erred in imposing sanctions in the first place.

The court of appeals' decision ignores the fundamental difference between the merits of a sanctioned party's action and the propriety of imposing those sanctions. Even where a claim is factually or legally weak, a party or attorney may be able to present persuasive arguments against the imposition of Rule 11 sanctions. That issue is separate from the legal and/or factual inadequacy of the document on which the sanctions were based. Just as Rule 11 is violated only when it is "patently clear that a claim has absolutely no chance of success," *Eastway Constr. Corp.*, 762 F.2d at 254, appellate attorneys' fees should be awarded in a Rule 11 dispute only if the appeal itself is frivolous.

Rule 38, Fed.R.App.P., provides an adequate remedy for frivolous appeals. The court of appeals' decision would render Rule 38 nugatory in appeals of Rule 11 sanction motions. Neither the language of Rule 11 nor the policy underlying that rule justifies carving out an exception to Rule 38 for this limited category of cases.

CONCLUSION

For the reasons stated herein, Amicus submits that this Court should adopt a three-tiered standard of appellate review in Rule 11 cases, in which appellate courts would determine on a *de novo* basis whether the facts of the case justify the imposition of sanctions. An appellate court must use particular caution in reviewing a decision not to impose sanctions, since those cases involve a far lower probability that the district court may have erred due to its frustration in having to deal with a difficult case. In addition, this Court should reverse that part of the court of appeals' decision which awarded appellate attorneys' fees without a finding that the appeal itself was frivolous.

Respectfully submitted,

Barry D. Roseman

On behalf of the Plaintiff
Employment Lawyers Association

Of counsel:

Craig M. Cornish

November 29, 1989

No. 89-275

Supreme Court, U.S.
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CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

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Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE LEGAL AFFAIRS COUNCIL AS AMICUS CURIAE

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No. 89-275

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE LEGAL AFFAIRS COUNCIL AS AMICUS CURIAE

INTEREST OF THE LEGAL AFFAIRS COUNCIL

The Legal Affairs Council is a non-profit organization dedicated to preserving the inherent and Constitutional rights of the people. Of highest priority to the Legal Affairs

Council is the protection of individual liberties guaranteed by the First Amendment to the Constitution; freedom to worship, freedom of speech and press, freedom to peaceably assemble and associate, and to petition the government for a redress of grievances.

Increasingly, during the last two decades, organizations and individuals opposed to certain fundamental American freedoms and institutions have filed frivolous lawsuits of a political nature against individuals and organizations working in support of those freedoms and institutions. As a result of these political lawsuits, individuals and groups have been forced to defend their political views in courtrooms--instead of in free debate--and at great expense. See, e.g., Avirgan, et al. v. Hull, et al., 705 F.Supp. 1544, clarified, 125 F.R.D. 185 (S.D. Fla. 1989). The courts

were not designed to be arbitrators of political policy disputes. Therefore, it is in the interest of the Legal Affairs Council to support the practice of deferring to U.S. district court judges' discretion concerning the propriety of granting sanctions against those who file groundless lawsuits to gain political ends. De novo appellate review of Rule 11 cases will encourage the misuse of the court system by allowing frivolous suits to be, in effect, relitigated at the appellate level at still greater cost to both the individual and the system.

SUMMARY OF ARGUMENT

The case before this Court is an example of the intensely factual nature of the inquiry that commonly is performed by a district court applying Rule 11 of the Federal Rules of Civil Procedure. During the six years since Rule 11 was

amended, the majority of circuit courts of appeals have ruled that great deference must be given district court decisions on questions of frivolous filings since district judges are in the best position to evaluate the evidence and to make findings based on varying factual patterns. District courts, furthermore, have the primary interest in and feel the primary effect of Rule 11 violations. Many factors are considered by judges deciding whether or not certain pleadings or conduct rise to a level warranting sanctions. Those determinations can best be made at the district court level, reviewable, certainly, but for an abuse of discretion.

An appellate court is not in an equal position to judge the conduct under review in a district court. It is a waste of judicial resources to require de novo review of Rule 11 district court

decisions in any aspect, when a deferential review adequately safeguards the rights of litigants. Additionally, de novo review would fail to produce useful legal precedent in Rule 11 cases since the fact pattern under investigation will always vary, rendering a fact-bound judgment of little use in subsequent Rule 11 cases.

ARGUMENT

THE APPROPRIATE STANDARD FOR APPELLATE REVIEW OF ALL RULE 11 ISSUES IS FOR ABUSE OF DISCRETION.

Since the amendment of Rule 11 in 1983, there have been more than fifteen hundred reported cases concerning the imposition of sanctions for filing frivolous pleadings. Federal Practice Advisory, issue No. 32, November 13, 1989, Page 1. The potential impact on the appellate system, through sheer

numbers, is staggering if each case demands de novo review. Though adopted by a minority of circuits and argued by Cooter & Gell in the petition presently before this Court, it is difficult to envision how de novo review of whether "the facts constitute a violation" furthers the purposes and goals of Rule 11. Petitioner's Brief at 31. "The perspective of the district court is singular;" the district court has the intimate familiarity with the parties and issues to be in the better position to judge the conduct of the parties. Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873 (5th Cir. 1988) (en banc). In addition, it is the responsibility of the district court to secure the effective operation of its system. Advisory Committee Notes to 1983 Amendments to Federal Rule of Civil Procedure 11 [hereinafter Advisory Committee

Notes]. To require appellate courts to conduct de novo review of these fact-intensive cases runs contrary to assuring that the efficiencies of operation promoted by Rule 11 are not offset by the cost of satellite litigation over the imposition of sanctions. Whether certain conduct and certain facts rise to the level of sanctionable conduct under Rule 11 is inevitably a judgement call, properly reviewable only for abuse of discretion. Mars Steel Corp. v. Continental Bank N.W., 880 F.2d 928, 934 (7th Cir. 1989) (en banc).

Though it is argued that certain Rule 11 disputes may be reviewed solely with reference to documents filed with the district court, the present case on appeal certainly does not fall within that category. The case before this Court is fact intensive, as are most Rule

11 cases. A de novo review as to whether the facts warrant the imposition of sanctions will not produce a valuable precedent as the establishment of a rule of law is not at stake. On the contrary, requiring de novo review on appeal would likely result in the circuit court "sink[ing] many hours into the case without duplicating the district court's feeling for the situation, and without generating an opinion having the slightest significance for tomorrow's disputes". Mars Steel Corp. v. Continental Bank N.A., 880 F.2d at 934. This would hardly conserve judicial resources and clearly ignores the normal division of labor between the district courts and the circuit courts. Id.

A. Due To The Fact-Intensive Nature of Rule 11 Cases, District Court Decisions Deserve Great Deference.

The 1983 amendment of Rule 11 was intended to reduce the evident reluctance of federal judges to impose sanctions, by emphasizing the responsibility of attorneys and setting an objective standard for the imposition of sanctions by the court. Advisory Committee Notes. Since 1983, a split of authority in the circuits has developed concerning the appropriate standard of review under the amended Rule 11.

The standard adopted by the Ninth Circuit and argued by Cooter & Gell in the present case, involves a three-tiered approach to appellate review. In Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986), the Ninth Circuit applied a clearly erroneous standard to factual questions, de novo review for application of law to the

findings of fact and reserved the abuse of discretion standard for review of the district court's selection of appropriate sanctions. Though basing its declaration of a standard of review on a need for consistency with "similar situations," and believing its decision to be consistent with Second, Fifth and Seventh Circuit decisions, the Ninth Circuit actually stands alone in its standard for Rule 11 appellate review.

Notwithstanding the Zaldivar assessment of the standard in the Second Circuit, that circuit adheres to a two-tiered standard as enunciated in Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2nd Cir. 1985). "Where the only question on appeal becomes whether, in fact, a pleading was groundless, we are in as good a position to determine the answer and, thus, we need not defer to the lower court's

opinion"; while the second tier of Eastway is that the factors considered in determining the nature and extent of the sanctions imposed will receive an abuse of discretion review. Id. The flaw in the Eastway court's reasoning is that it requires a de novo review of legal conclusions which, of necessity, rest on a scaffold of factual findings. The result will force appellate courts into the role properly reserved to trial courts.

The Fifth and Seventh Circuits, post-Zaldivar, have both abrogated a multi-tiered approach and have unequivocally adopted an across-the- board abuse of discretion standard of review. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d at 933; Thomas v. Capital Security Services, Inc., 836 F.2d at 872. While the Seventh Circuit in Mars Steel compares a Rule 11 appeal to the appeal of a decision concerning a tort action,

in which findings of fact are disturbed only if "clearly erroneous," the Seventh Circuit decides that it will stand with six other circuit courts and employ full deferential review "including [to] the application of legal rules to facts". Id.

After having applied the three-tiered approach in Robinson v. National Cash Register Co., 808 F.2d 1119, 1125-26 (5th Cir. 1987), the Fifth Circuit clearly abandoned that approach in Thomas v. Capital Security Services, Inc., 836 F.2d at 872, by finding that although the use of the imperative "shall impose . . . an appropriate sanction . . ." contained in Rule 11 can broaden the scope of appellate review, the rule should not be interpreted to remove the district court's necessary use of discretion on any issue arising in a Rule 11 case, "discretion which it must

enjoy to effectively regulate its courtroom." In abandoning the de novo standard, the Fifth Circuit cites the opinion of C. Shaffer, Jr. and P. Sandler, Sanctions: Rule 11 and Other Powers, at 28-29 (2d ed. 1987), that those circuits retaining de novo review do so most probably in an effort to attain uniformity in the evolving law of sanctions, "but the goal of uniformity may be no better served by the de novo standard because many sanctions cases are fact-intensive, close calls." Id. The Fifth Circuit declined to view the conduct of the litigants as if they were "litigating their case initially on the appellate level". Thomas v. Capital Security Services, Inc., 836 F.2d at 872.

The Eleventh and District of Columbia Circuits join the Second Circuit in applying the de novo standard to whether a pleading or motion is legally

sufficient while reserving to the district court's discretion the determination of whether factual, dilatory or bad faith reasons exist to impose Rule 11 sanctions. Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985). While under Zaldivar, the Ninth Circuit reviews de novo the district court's legal conclusion that a particular set of facts rises to the level of sanctionable conduct, the District of Columbia, Eleventh and Second Circuits apply de novo review to the narrow question of whether a pleading or motion is legally sufficient. Id.; Donaldson v. Clark, 819 F.2d at 1556; Eastway Construction Corp. v. City of New York, 762 F.2d at 254 n.7.

Those circuits applying de novo review to legal sufficiency of a pleading or motion appear to do so in response to

the mandatory language contained in the amended Rule 11: "the court 'shall impose' sanctions." Westmoreland v. CBS, Inc., 770 F.2d at 1174. There is no difference however, between the Rule 11 directive and the rule of law in negligence cases that if a trial court finds negligence, it shall afford the injured party a remedy. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d at 935. The requirement in tort of "if violation then remedy" does not dictate de novo review on appeal of fact specific tort cases. Id. (emphasis in original). There is no compelling reason why the same tenet should not apply in Rule 11 cases.

The remaining circuits have adopted an across the board abuse of

discretion standard.[1] In doing so, the First Circuit stated that it found persuasive the argument that the abuse of discretion standard lends itself to "ease in application and . . . vests the lion's share of the responsibility for imposing Rule 11 sanctions with the judicial actor closest to the litigation--the district judge." Kale v. Combined Insurance Co., 861 F.2d at 758. While acknowledging the mandatory language in the Rule, the First Circuit determined that it could not "escape the fact that at its core imposition of sanctions is 'a judgment call'." Id., (citing FDIC v. Tekfen Construction

[1] Kale v. Combined Insurance Co., 861 F.2d 746, 758 (1st Cir. 1988); Teamsters v. Cement Express, Inc., 841 F.2d 66, 68 (3rd Cir. 1988); Stevens v. Lawyers Mutual Liability Insurance Co., 789 F.2d 1056, 1060 (4th Cir. 1986); Century Products, Inc. v. Sutter, 837 F.2d 247, 253 (6th Cir. 1988); O'Connell v. Champion International Corp., 812 F.2d 393, 395 (8th Cir. 1987); Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988).

and Installation Co., Inc., 847 F.2d 440, 443 (7th Cir. 1988).

Appellate courts have traditionally accorded deference to the factual findings of the trial court that require deference in Rule 11 cases. These cases are fact intensive. Although the 1983 amendment of the Rule created an objective rather than subjective standard against which the litigants' conduct is measured, the determination that: (1) a pre-filing inquiry was reasonable, (2) that sufficient facts support a claim, or (3) that the paper was filed for an improper purpose, requires judgement based on the underlying facts. It will always be a question of degree. The district court develops a familiarity with trial counsel, norms of practice in the jurisdiction, the litigants and the issues; this familiarity cannot be duplicated on appeal. The district court has

an immediate need to ensure that its court is not abused by parties; it is the court's own time that is wasted when a paper in violation of Rule 11 is filed and argued. It is in the district court's best interest to ensure that the litigation before it fulfills the letter of Rule 11; and the district court is in the best position to achieve that end.

This is not to imply that appellate review rubber stamp district court Rule 11 findings. However, deference must be given to a finding made by the court with a greater interest in and opportunity to observe Rule 11 cases.

B. **No Purpose Is Served By Requiring De Novo Review of Rule 11 Cases.**

Rule 11 was promulgated to enable more efficient use of the court system. See Advisory Committee Notes. But there is concern that the efficiencies affected

might be offset by "satellite litigation over the imposition of sanctions". Id. What better way to ensure that litigation over Rule 11 sanctions multiply than to afford the Rule 11 litigant de novo review of the facts giving rise to a sanction; in effect, giving a second bite at the apple, and turning the appellate court into a trial court. The rights of appellant are safeguarded by deferential review of the district court decision. The appellate court cannot have the same insight as does the district court, nor has it the same interest in the outcome.

> Fact intensive disputes, those whose resolution is unlikely to establish rules of future conduct, are reviewed under a deferential standard because the role of appellate courts in establishing and articulating rules of law is not at stake. District judges have the best information about the patterns of their cases, information appellate judges could duplicate only at great cost in time. . . . Even when the dispute may be resolved by examining documents, the claim

> that the court of appeals is in as good a position as the district judge to review a written record disregards the division of labor (why should three judges redo the work of one?), . . . and . . . would not produce a valuable precedent.

Mars Steel Corp. v. Continental Bank N.A., 880 F.2d at 933-34 (citing Anderson v. Bessemer City, 470 U.S. 564, 573-76, 105 S. Ct. 1504, 1511-13, 84 L. Ed.2d 518 (1985).

Requiring de novo review of Rule 11 issues will not produce a better decision since the most complete information necessary for that decision was available at the district court, not the circuit court. In these fact-intensive cases, an appellate judgment will have no value as a rule of law. De novo review increases the expenditure of judicial resources needlessly since review for abuse of discretion adequately safeguards the rights of the parties.

CONCLUSION

For the reasons expressed above, the appropriate standard of review for all Rule 11 issues should be review for abuse of discretion only. That finding would produce the best decisions in these fact-intensive cases, and also best suits the purposes for which Rule 11 was enacted.

It is respectfully submitted that the decision below on this issue should be affirmed and the relief sought by the respondent should be granted.

LEGAL AFFAIRS COUNCIL

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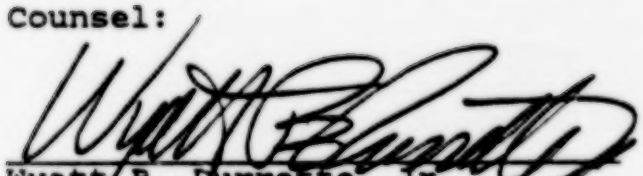

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IN THE
Supreme Court of the United States
October Term, 1989

COOTER & GELL,
Petitioner,

v.

HARTMARX CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amicus will address the following issues:

1. Whether authority exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed.R.Civ.P. 41(a)(1)(i).

2. Whether a court of appeals can automatically impose Rule 11 sanctions on appeal upon affirmance of a Rule 11 award.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-275

COOTER & GELL,
Petitioner,

v.

HARTMARX CORPORATION, *et al.*,
Respondents.

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of time to advancing the interests of the free enterprise system. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business. *See, e.g., Peel v. Attorney Registration and Disciplinary Commission of Illinois* (Docket # 88-1755; *cert. granted*, 57 U.S.L.W. 3859 (1989)); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989); *Tull v. United States*, 107 S.Ct. 1831 (1987);

and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

WLF believes that our nation's free enterprise system has suffered greatly in recent decades as a result of the litigation explosion that has clogged both State and federal courts. WLF believes that amended Rule 11, Fed.R.Civ.P., can be an effective tool in combatting the ill effects of the litigation explosion; accordingly, WLF has consistently advocated for an expansive reading of Rule 11. Since WLF's approach to this case is focused less on the facts of the case and more on the policy considerations underlying Rule 11, WLF believes that it can assist the Court by providing the Court with a perspective that is distinct from that of either party.

WLF submits this brief on behalf of Respondents with the written consent of both parties.

STATEMENT OF THE CASE

In the interest of judicial economy, *amicus* adopts by reference the statement of the case set forth by Respondents. Nonetheless, WLF wishes to clarify what is *not* at issue in this case. Whether the district court abused its discretion in imposing Rule 11 sanctions on Petitioner under the facts of this case is not before the Court. The court of appeals held that the district court did not abuse its discretion when it imposed Rule 11 sanctions (*Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 896 (D.C. Cir. 1989)), and this Court declined to review the court of appeals' determination. Accordingly, the lengthy recitation of the facts of this case contained in Petitioner's brief is essentially irrelevant to the outcome of the case. That lengthy recitation -- which relates primarily to Petitioner's conduct before filing suit -- appears to be an attempt to cast Petitioner in a more

sympathetic light but has little bearing on the outcome of the issues that the Court has agreed to review.

Similarly, whether the amount of sanctions awarded against Petitioner was "so excessive as to constitute an abuse of discretion" also is not before the Court. The court of appeals held that the amount of Rule 11 sanctions imposed by the district court did not constitute abuse of discretion (*id.* at 897), and this Court declined to review the court of appeals' determination. Petitioner argues at length in its brief that Respondents failed to mitigate their damages and thus that the Rule 11 sanctions awarded to Respondents should have been reduced accordingly. Petitioner's Brief at 7-8, 14, 17-18, 36, and 38-39. Regardless of the merits of Petitioner's arguments, the arguments are irrelevant since the issue of whether Respondents improperly failed to mitigate their damages is not before the court.

This brief addresses the first and third questions presented for review in this case: whether authority exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed.R.Civ.P. 41(a)(1)(i), and whether a court of appeals may impose Rule 11 sanctions on appeal upon affirmance of a Rule 11 award. The brief does not address the second question presented for review: whether review of Rule 11 sanctions under an "abuse of discretion" standard is appropriate.

SUMMARY OF ARGUMENT

Rule 41. Voluntary dismissal of a case under Rule 41(a)(1)(i), Federal Rules of Civil Procedure, does not deprive a district court of power to impose Rule 11 sanctions against a plaintiff. Nothing in the language of Rule 41(a)(1)(i) requires such a result. Moreover,

prohibiting an award of Rule 11 sanctions under those circumstances would run counter to the policy considerations underlying Rule 11. In any event, Petitioner was not entitled to invoke Rule 41(a)(1)(i), because Respondents filed the equivalent of a summary judgment motion prior to Petitioner's attempted voluntary dismissal.

Appellate Attorney Fees. The court of appeals did not impose any appellate attorney fees on Petitioner in this case. Rather, the court of appeals remanded the case to the district court in order to permit the district court to determine what additional sanctions against Petitioner were warranted under Rule 11. Since no fees were imposed, there is no occasion for this Court to consider whether the court of appeals exceeded its powers. The court of appeals acted properly in determining that the change in circumstances since the district court's initial Rule 11 determination -- *i.e.*, the incurring by Respondents of additional attorney fees on appeal -- warranted a remand to the district court for a redetermination of the appropriate Rule 11 sanction.

Rule 11 Generally. Petitioner's brief is a thinly disguised attack on the entire framework of Rule 11; the brief suggests that Rule 11 is being widely abused and that use of the rule needs to be curbed. While Petitioner's attack on Rule 11 has no bearing on determination of the issues which the Court has agreed to review, WLF believes that it is important that the attack not go unanswered. Far from being the untamed monster described by Petitioner, Rule 11 is an important and effective tool in the effort to rid the federal courts of abusive litigation tactics.

ARGUMENT

I. RULE 11 IS A VALUABLE TOOL IN THE EFFORT TO CURB ABUSIVE LITIGATION TACTICS AND SHOULD NOT ITSELF BE CURBED IN THE FACE OF UNFOUNDED ALLEGATIONS THAT IT IS CHILLING ADVOCACY.

Underlying most of the arguments raised by Petitioner in this case is a thinly disguised hostility to Rule 11. As Petitioner would have it, Rule 11 is a monster in need of taming. Petitioner contends that Rule 11 has "become part of every defendant's litigation bag" (Petitioner's Brief at 34 n.31) and "chills creative litigation" (*id.* at 34) and that application of Rule 11 is "confused" and "unpredictable" (*id.* at 33). An unstated premise of Petitioner's argument is that this Court could help to tame Rule 11 by ruling for Petitioner on the issues raised in this case.

As set forth in Parts II and III of this brief, *infra*, the Washington Legal Foundation (WLF) opposes the position taken by Petitioner on the issues raised in this case. More fundamentally, however, WLF disagrees with Petitioner's assessment that the application of Rule 11 needs to be curbed. To the contrary, WLF believes that Rule 11, as amended in 1983, is a valuable tool in the effort to curb abusive litigation; its use ought to be encouraged to the maximum extent possible, consistent with its language and intent.

Lest Petitioner's overall assessment of the impact of Rule 11 might influence the Court's disposition of the issues raised in this case, WLF believes it important to set forth the circumstances that led to the strengthening of Rule 11 in 1983 and to challenge Petitioner's assessment that Rule 11 needs to be curbed.

A. Rule 11 Was Amended in the Face of a Litigation Explosion That Threatens to Engulf Our Court Systems.

The circumstances that led to the strengthening of Rule 11 in 1983 should be borne in mind.[1] The decade that preceded the amendment of Rule 11 witnessed a litigation explosion, both in terms of the number of lawsuits being filed and in terms of the extent to which particular lawsuits were being drawn out by abusive litigation tactics. During the 1970's, federal district court filings doubled and trials lasting over 30 days tripled. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Calif. L. Rev. 770, 771 (1981). In filing a dissenting statement from the Supreme Court's adoption of the 1980 amendments to Rules 26, 33, 34, and 37, Justice Powell argued that the amendments fell far short of reforms necessary to curb what he viewed as abusive discovery tactics all too prevalent in federal litigation. *Order Adopting Rules Amendments*, 446 U.S. 997, 998 (1980) (Powell, J., dissenting). Justice Powell, joined in his dissent by Justices Stewart and Rehnquist, argued that as a result of inadequate controls on federal litigation discovery practices, "Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system." *Id.* at 1000. The federal courts became "increasingly mired in congestion, delay, and high litigation costs," at least in part due to the liberal pleading rules of the Federal Rules of Civil Procedure, which made it virtually im-

[1] The 1983 amendments to the Federal Rules of Civil Procedure also included related amendments to Rule 7, Rule 16 (which, among other things, provided federal district courts with explicit authority to impose sanctions upon a party or attorney that fails to obey a scheduling or pretrial order) and Rule 26(g) (which imposes requirements on those filing discovery requests that parallel the requirements of Rule 11).

possible for courts to weed out unmeritorious claims and defenses prior to trial. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N. C. L. Rev. 1023, 1024-1033 (1989).

The 1983 amendments to the Federal Rules of Civil Procedure were an attempt to curb the abuses that had contributed to the litigation explosion of the 1970's. Rule 11 was amended to provide for more frequent imposition of sanctions against parties who abuse the litigation process by filing pleadings or motions not well founded in fact or law. *See* Notes of Advisory Committee on Rules regarding 1983 amendment to Rule 11 ("Advisory Committee Notes") ("Experience shows that in practice [former] Rule 11 has not been effective in deterring abuses... The new language is intended to reduce the reluctance to impose sanctions"). At the same time, Rule 26(g) was added "to curb discovery abuses by explicitly encouraging the imposition of sanctions." Advisory Committee Notes regarding 1983 amendment to Rule 26.

It remains to be seen whether the 1983 amendments will provide an effective check against abusive litigation tactics. Nonetheless, in evaluating the merits of amended Rule 11, one must bear in mind the extreme problems in our court systems that gave rise to the amendment.

B. Amended Rule 11 Has Not Had the Chilling Effect on Creative Advocacy Asserted by Petitioner and Does Not Need To Be Curbed.

Despite Petitioner's assertion to the contrary, there is no evidence that amended Rule 11 is chilling "crea-

tive advocacy" or is otherwise in need of being curbed. Commentators who have studied the effects of Rule 11 have been unable to detect any appreciable chilling effect on non-abusive litigation tactics. For example, Judge Schwarzer of the U.S. District Court for the Northern District of California (whose views on Rule 11 are cited in Petitioner's brief) writes, "My own experience has disclosed no anecdotal evidence of chilling [of advocacy]." Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1017 (1988). *See also* Louis, *supra*, 67 N. C. L. Rev. at 1055; Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 Cath. L. Rev. 587, 590-91 (1987).

Petitioner cites studies showing that plaintiffs and their counsel are sanctioned more frequently than defendants; Petitioner asserts that those studies demonstrate that certain trial judges are imposing Rule 11 sanctions based on their "personal views," thereby chilling "creative litigation." Petitioner's Brief at 34.

The studies cited by Petitioner do not support that assertion. Perhaps the most comprehensive study to date on imposition of sanctions under Rule 11 -- and one cited by Petitioner -- was performed by Prof. Georgene Vairo. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988). That study indicated that between August 1, 1983 and December 15, 1987, Rule 11 sanctions were sought in 680 reported federal cases, and sanctions were imposed in 57.8% of those cases. Sanctions were imposed at an only slightly higher rate in cases in which the target was a plaintiff (59.6%) than in cases in which the target was a defendant (51.4%). *Id.* at 200.[2] Accordingly, the study offers no support

[2] The study found that since defendants were far more likely to bring Rule 11 motions than were plaintiffs, the total number of occasions on which plaintiffs were sanctioned far exceeded the number of occasions on which defendants were sanctioned. *Id.* at 200. The study drew no conclusions from the disparity in Rule 11 filings by defendants versus filings by plaintiffs; in particular, the study did not conclude that Rule 11 was in any way biased against plaintiffs. The study opined that the disparity might mean that plaintiffs as a group are more likely to file frivolous pleadings and motions than are defendants. *Id.* at 201.

(continued...)

for Petitioner's assertion that discriminatory imposition of Rule 11 sanctions by federal judges is chilling creative advocacy.[3]

(...continued)

The study did not examine reported cases in which sanctions were imposed under Rule 26(g) for discovery abuses. One can surmise that the principal abusive litigation tactic engaged in by plaintiffs as a group is the filing of frivolous complaints, while the principal abusive litigation tactic engaged in by defendants as a group is the filing of unwarranted discovery requests. If that is correct, one would expect that plaintiffs would be the targets in a majority of Rule 11 motions and that defendants would be the targets in a majority of Rule 26(g) motions. Neither the Vairo study nor the other studies cited by Petitioner attempt to measure the combined effect of all the 1983 rules amendments on plaintiffs versus their effect on defendants.

[3] Nor is Petitioner's assertion supported by the Vairo study's finding that plaintiffs in civil rights lawsuits are sanctioned under Rule 11 at a rate significantly higher than other litigants. The study drew no conclusions from that finding. *Id.* at 200. Other commentators have concluded that civil rights cases have long been "regarded as a major source of meritless litigation." Louis, *supra*, 67 N. C. L. Rev. at 1055. That conclusion -- which would explain any disparity in sanctioning rates -- is hardly surprising when one considers that a majority of "civil rights" cases in federal court are suits filed by state prisoners complaining about the conditions of their confinement, often filed without the assistance of counsel. *See Patsy v. Board of Regents*, 457 U.S. 496, 533 (1982) (Powell, J., dissenting). Moreover, increased imposition of Rule 11 sanctions in civil rights lawsuits is particularly unlikely to deter the assertion of non-frivolous civil rights claims in light of the availability of attorney fees to prevailing plaintiffs in such suits, under 42 U.S.C. § 1988.

Petitioner's assertion that Rule 11 sanctions are being imposed disproportionately on plaintiffs is particularly ironic when one considers that Danik, Inc. (Petitioner's client), while nominally a plaintiff in this case, could more accurately be described as a defendant in its overall posture *vis-a-vis* Respondents. One of the Respondents initially filed suit against Danik for nonpayment of certain invoices, and Danik responded by filing a counterclaim alleging Robinson-Patman Act violations. While Danik could have chosen to file its antitrust claims against Respondents as an additional counterclaim, it instead chose to file those claims (claims later found to have been filed in violation of Rule 11) in a separate lawsuit. Petitioner's Brief at 3. Petitioner made clear in subsequent settlement discussions that settlement of the unpaid invoice claims was tied to settlement of the antitrust claims; accordingly, Danik's antitrust claims can be said to have been part of its defense to the unpaid invoice claims. Petitioner's filing of Danik's antitrust claims in violation of Rule 11 is hardly unprecedented: one commentator has found that "[f]or many years ... answers to complaints filed by large businesses routinely would include an antitrust counterclaim." Louis, *supra*, 67 N. C. L. Rev. at 1031 n.62. Indeed, the facts of this case undermine any assertion that Rule 11 is designed to benefit defendants at the expense of plaintiffs; defendants filing frivolous antitrust counterclaims in order to avoid payment of valid contractual claims are just as liable for sanction under Rule 11 as any plaintiff filing a frivilous claim.

Perhaps the best evidence that imposition of Rule 11 sanctions is not chilling non-frivolous litigation is the small number of occasions on which such sanctions have been imposed. The Vairo study uncovered 380 reported instances in which Rule 11 sanctions had been imposed in the first four and one-half years following

adoption of amended Rule 11. Even assuming that there were at least as many unreported instances of imposition of Rule 11 sanctions during the same period, the total number of instances in which Rule 11 sanctions have been imposed is miniscule in comparison to the total number of pleadings, motions, and other papers filed in federal court each year.[4]

WLF submits that there is no basis for the premise underlying Petitioner's brief that Rule 11 sanctions have been unfairly applied in practice and therefore ought to be curbed. The Court ought to decide this case based solely on the language and intent of Rule 11 and not on a generalized belief that the reach of Rule 11 ought to be restricted.

II. VOLUNTARY DISMISSAL UNDER RULE 41 (a)(1)(i) DOES NOT PRECLUDE SUBSEQUENT IMPOSITION OF RULE 11 SANCTIONS.

Petitioner filed this lawsuit on behalf of Danik in November 1983. Respondents subsequently filed a motion to dismiss under Rule 12(b)(6) for failure to state a cause of action; the motion was accompanied by affidavits denying the factual underpinnings of Danik's claims. Five days later, Respondents filed a motion seeking imposition of Rule 11 sanctions against both Danik and Petitioner, alleging that the complaint was not well founded in fact or law. The district court heard oral arguments on both motions, but before the court could issue a ruling, Petitioner filed a notice of voluntary dismissal of the lawsuit under Rule 41(a)(1)(i) in April 1984. Almost four years later, in February

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[4] In excess of 250,000 new civil cases are filed in the federal courts in a typical year. *See* Levin and Sobel, *supra*, 36 Cath. L. Rev. at 592 n.19.

1988, the district court granted Respondents' Rule 11 motion.

Petitioner contends that, due to its voluntary dismissal pursuant to Rule 41(a)(1)(i), the district court was precluded from taking any further action in the case -- including ruling on the pending Rule 11 motion. The relationship between Rule 41(a)(1)(i) and Rule 11 has been the subject of numerous appellate court decisions, including the decision of the court below that Rule 41(a)(1)(i) dismissal does not bar a district court from ruling on a Rule 11 motion. *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 895 (D.C. Cir. 1989). Five other courts of appeals have agreed with the D.C. Circuit (the First, Third, Seventh, Eighth, and Ninth Circuits),[5] while one court of appeals (the Second Circuit) has taken the contrary view.[6]

WLF supports the majority position. WLF will not repeat the numerous arguments raised by the written decisions issued by the six courts of appeals that held that Rule 41(a)(1)(i) does not bar a district court from ruling on a Rule 11 motion. Nonetheless, WLF wishes to stress several points that may not previously have been fully explicated.

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[5] *Schering Corp. v. Vitarine Pharmaceuticals, Inc.*, ___ F.2d ___, No. 89-5309 (3d Cir. 1989); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603-04 (1st Cir. 1989); *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1076-79 (7th Cir. 1987), *cert. dismissed*, 108 S.Ct. 1101 (1988); and *Kurkowski v. Volcker*, 819 F.2d 201, 203 (8th Cir. 1987).

[6] *Johnson Chemical Co. v. Home Care Products, Inc.*, 823 F.2d 28, 30-31 (2d Cir. 1987).

A. Rule 41(a)(1)(i) Is Inapplicable to This Case Because Respondents Filed the Equivalent of a Summary Judgment Motion Prior to the Filing of the Dismissal Notice by Plaintiff.

Rule 41(a)(1)(i) permits a plaintiff to file a notice of dismissal without prejudice "at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first." Prior to Petitioner's filing of a dismissal notice in this case, Respondents filed a motion designated as a motion to dismiss under Rule 12(b)(6) for failure to state a cause of action. However, the motion was accompanied by affidavits which introduced evidence outside the pleadings, and those affidavits were not excluded by the district court. Accordingly, pursuant to Rule 12(b), Respondent's motion should be treated as one for summary judgment.

Since Respondents should be deemed to have filed a summary judgment motion and since that motion was filed before Petitioner attempted a voluntary dismissal, Rule 41(a) precluded Petitioner from obtaining a voluntary dismissal in the absence of permission either from the court or from Respondents -- neither of whom gave their consent in this case. Case law is clear that the filing of a motion which is designated a motion to dismiss, but which should, in fact, be classified as a motion for summary judgment within the meaning of Rule 12(b), operates to prevent a voluntary dismissal under Rule 41(a)(1)(i). *See* 5 *Moore's Federal Practice* ¶ 41.02[3] at 41-26 (2d ed. 1985). Accordingly, regardless of how the Court comes out on the legal issue that resulted in a 6-1 split of the courts of appeals, Petitioner should not be permitted to invoke Rule 41(a)(1)(i) under the facts of this case.

B. The Plain Language of Rule 41(a)(1)(i) Supports a Finding That the District Court Was Entitled to Rule Upon the Rule 11 Motion.

WLF cannot agree with Petitioner's contention that the plain language of Rule 41(a)(1)(i) supports Petitioner's position in this case. Indeed, a straightforward reading of Rule 41(a)(1)(i) leads one to the opposite conclusion. Rule 41(a)(1)(i) states merely that a voluntary dismissal under that Rule is "without prejudice." In other words, Rule 41(a)(1)(i) provides that a plaintiff meeting the prerequisites of that rule is not to be placed in a worse position as a result of filing a voluntary dismissal. But subjecting such a plaintiff to a Rule 11 motion for sanctions does not place the plaintiff in a position any worse than the position that he would have been in but for the voluntary dismissal, because he still would have been subject to a motion for sanctions even had he not moved for voluntary dismissal. Consequently, nothing in the language of Rule 41(a)(1)(i) precludes application of Rule 11 to a plaintiff who has obtained a voluntary dismissal.

Petitioner cites to case authority holding that once a plaintiff has obtained a voluntary dismissal in compliance with Rule 41(a)(1)(i), the district court is without power to enter any order that would prejudice the plaintiff's right to reassert the same claim in that court or another court. None of those cases has any bearing on this case. Leaving aside statute of limitation questions, Respondents do not contend that Danik's right to reassert its antitrust claims now or in the future was in any way prejudiced by Danik's assertion and subsequent voluntary dismissal of those claims. Rather, the issue is whether Petitioner may be sanctioned under Rule 11 for conduct found both by the district court and by the court of appeals to be in violation of Rule 11. WLF

submits that nothing in the language of Rule 41(a)(1)(i) prevents imposition of such a sanction.

C. Policy Considerations Underlying Rule 11 Support an Award of Sanctions.

The briefs of Petitioner and its supporting *amici* suggest that allowing federal court plaintiffs a Rule 41(a)(1)(i) "safe harbor," free from fear of Rule 11 sanctions, would promote efficient operation of the federal judicial system. WLF finds unpersuasive each of the policy arguments raised in those briefs.

First, there is no reason to believe, as asserted by Petitioner and the Association of Trial Lawyers of America, that permitting imposition of Rule 11 sanctions following a Rule 41(a)(1)(i) dismissal would discourage voluntary dismissal of cases. The fact that a voluntary dismissal has been filed could not be used as evidence that a lawsuit was filed in violation of Rule 11, since the violation -- if one occurs -- is complete upon the filing of the pleading in question; thus, the state of mind or conduct of a plaintiff or his counsel at a point in time after the initial filing has no bearing on whether the filing was made in violation of Rule 11. To the contrary, a plaintiff/counsel who fears that he may have committed a Rule 11 violation has every incentive to file a voluntary dismissal at the earliest possible moment, because such a filing would serve to minimize the attorney fees that he might later be ordered to reimburse as a Rule 11 sanction.

The Association of Trial Lawyers of America also suggests that little harm can come from giving plaintiffs one free bite (*i.e.*, a little breathing room between the time the complaint is filed and the time an answer is filed during which time no Rule 11 sanctions are awardable) because it is "a rare plaintiff" who starts a

lawsuit without any intent of pursuing it. ATLA Brief at 8. WLF disagrees with that assessment; indeed, the record facts in this case suggest that Petitioner filed its antitrust suit with little intention of pursuing it beyond the most preliminary stages. Rather, Petitioner appears to have filed suit as a way of obtaining leverage over Respondents in the collection action that Respondents had filed against Danik.[7] Providing plaintiffs with the

[7] The record suggests that Petitioner had such a motivation irrespective of the distict court's finding that Petitioner failed to make a reasonable inquiry, prior to filing the antitrust complaint, into the facts alleged therein. Even if one accepts that Petitioner's pre-filing inquiry was sufficient to give Petitioner a reasonable basis for believing that Respondents had established a distribution network involving an exclusive retail agent in each major metropolitan area, that factual predicate would have been insufficient as a matter of law to establish any causes of action. This Court has held that the "rule of reason" applies in determining whether a non-price vertical restraint of trade (such as the establishment of exclusive sales agents by a manufacturer of goods) violate the antitrust laws. *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977). In applying the rule of reason, "The reasonableness of a particular non-price vertical restraint is judged by whether it produces an anticompetitive effect in interbrand competition [*i.e.*, competition among various producers] in the relevant geographic and product markets and not merely by whether it reduces intrabrand competition [*i.e.*, competition among various retailers handling the product of the company imposing the vertical restraint]." *Carlson Machine Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253, 1262 (5th Cir. 1982). Petitioner had absolutely no basis for believing that any exclusive sales agent network established by Respondents could have any effect on interbrand competition in the relevant market: men's clothing sold in the United States. Respondents controlled only a tiny percentage of that market; courts have held as a matter of law that such a small share of the relevant market is too small for any restraint on intrabrand competition (which Petitioner believed to consist of an exclusive sales agent network) to have a substantially adverse effect on interbrand competition. *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011 (9th Cir. 1983). Thus, assuming the facts to be as Petitioner believed them to be, Petitioner allegation that Respondents had violated the antitrust laws was unwarranted, both on the basis of existing law and on the

(continued...)

breathing space sought by ATLA would significantly diminish the risk of sanctions to plaintiffs/counsel who file lawsuits in violation of Rule 11 solely for the purpose of obtaining settlement leverage.

WLF does support one of the suggestions made by ATLA in its brief. Noting the long delay in this case between the filing of Respondent's Rule 11 motion and the district court's ruling, ATLA suggests that the Court establish guidelines regarding timeliness of Rule 11 motions and rulings. WLF concurs in that suggestion. A defendant should not be permitted to wait inordinately following a Rule 41(a)(1)(i) dismissal to file a Rule 11 motion, and justice is not served when a district court delays almost four years before ruling on a Rule 11 motion. Nonetheless, Respondents -- who filed their Rule 11 motion long before Petitioner filed its Rule 41(a)(1)(i) notice -- should not be penalized for the district court's delay, a delay that was beyond Respondents' control.

III. THE COURTS BELOW PROPERLY EXERCISED THEIR RULE 11 POWERS IN FORMULATING A SANCTION THAT INCLUDED APPELLATE COSTS.

After affirming the district court's imposition of Rule 11 sanctions, the court of appeals in this case directed the district court to enter an "appropriate" additional award taking into account attorney fees incurred by Respondents on appeal. Petitioner contends that the court of appeals had no power to shift the burden of appellate attorney fees from Respondents to Petitioner in the absence of a finding, pursuant to

[7] (...continued)
basis of an argument for the extension, modification, or reversal of existing law.

Federal Rule of Appellate Procedure 38, that the appeal was frivilous.[8] WLF disagrees with that contention.

There is a split of authority in the courts of appeals regarding whether appellate attorney fees are awardable as a Rule 11 sanction where the appeal is non-frivolous. Two courts of appeals (the First and Seventh Circuits) agree with the D.C. Circuit that such fees are awardable as a Rule 11 sanction,[9] while two courts of appeals (the Fourth and Ninth Circuits) hold that such fees are recoverable only if the appeal from Rule 11 sanctions is itself frivolous.[10] WLF will again refrain from repeating arguments contained in any of the court of appeals decisions but will confine its arguments to several other issues that may be of assistance to the Court.

A. Question of Whether Court of Appeals Has "Power" to Award Attorney Fees Is Not Relevant, Since Any Award in This Case Will Come from District Court.

Petitioner and its supporting *amici* phrase much of their discussion of the appellate attorney fees issue in terms of whether courts of appeals have "power" to

[8] WLF would concede that Petitioner's appeal to the court of appeals was not frivolous, at least to the extent that the appeal was based on Petitioner's Rule 41(a)(1)(i) claim. In light of the Second Circuit precedent supporting Petitioner's position on that issue, it would be impossible to characterize Petitioner's appeal as utterly frivolous.

[9] *Hays v. Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988); *Muthig, supra*, 838 F.2d at 607.

[10] *Orange Production Credit Association v. Frontline Ventures, Ltd.*, 801 F.2d 1581 (9th Cir. 1986); *Basch v. Westinghouse Electric Corp.*, 777 F.2d 165, 175 (4th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986).

impose such fees in non-frivolous appeals of Rule 11 sanctions. However, the question of the courts of appeals' "power" is largely irrelevant to the determination of this case, because any award of appellate attorney fees to Respondents will come from the district court, not the court of appeals.

The court of appeals stated explicitly that it was not awarding Rule 11 fees on its own authority: "Here, however, we do not 'award fees under Rule 11'; we merely reaffirm that the district court's award under Rule 11 of expenses 'incurred because of' the unfounded filing should include appellate expenses incurred in defense of that award... [W]e remand to the district court to determine such expenses and, ultimately, to enter an appropriate award." *Danik, Inc. v. Hartmarx Corp., supra*, 875 F.2d at 898. It will be up to the district court on remand to determine the appropriate amount of any additional Rule 11 sanction; that additional sanction may or may not be as large as appellate attorney fees incurred by Respondents. The district court may decide that some portion of Respondents' appellate attorney fees was unreasonable and it may further decide, based on all the facts of the case, that little or no additional sanction is warranted.[11]

[11] The appropriate amount of any additional Rule 11 sanction must, in the first instance, be left to the discretion of the district court. That is true in light of Rule 11's primary purpose as a deterrent against abusive litigation practices rather than as a method of compensating the victims of those abusive practices. *See Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 58 U.S.L.W. 4038, 4039 (1989). The plain language of Rule 11 makes clear that an award of compensation is at the discretion of the district judge; if the district judge on remand in this case believes that no deterrent effect would be achieved by an additional award to Respondents, then he would be acting in accordance with Rule 11 (and within his mandate from the court of appeals) in granting no further Rule 11 sanctions.

The court of appeals in this case did nothing more than facilitate a reappraisal of the case by the district court in light of changed circumstances. At the time it initially determined a proper Rule 11 sanction (a sanction, by the way, that was far less than the district court attorney fees actually incurred by Respondents), the district court could not take into account Respondents' appellate attorney fees because it had no way of knowing whether Petitioner and/or Danik would appeal. Thus, had the court of appeals declined to remand the case to the district court for reappraisal of Rule 11 sanctions in light of Respondents' newly incurred appellate attorney fees, Respondents would have lost all opportunity to seek compensation for a portion of the costs it incurred (in the words of Rule 11) "because of" a Rule 11 violation. Far from exceeding its "powers," the court of appeals acted in a manner most likely to effectuate the purposes of Rule 11.

B. Policy Considerations Underlying Rule 11 Dictate that Appellate Fees Be Recoverable.

Contrary to the contentions of Petitioner and supporting *amici*, permitting victims of Rule 11 violations to seek recovery of appellate attorney fees (when no such recovery is permitted to those accused of Rule 11 violations who prevail on appeal) does not unduly favor one party to an appeal over the other. It is inescapable, in the event of a Rule 11 appeal, that the party claiming to have been the victim of a Rule 11 violation will incur appellate attorney fees. Those fees will have to be borne by one of the two parties. It may well be that the Rule 11 violator raises non-frivolous issues on his appeal and to that extent his appeal can be said to be justified; nonetheless, both fairness and the purposes of Rule 11 dictate that if the Rule 11 violator loses on appeal, he rather than the victim of his violations ought

to bear the costs incurred as a result of that appeal, costs that would not have been incurred but for the initial Rule 11 violation.

Moreover, there is virtually no danger that a rule permitting award of appellate attorney fees in Rule 11 cases will unduly chill meritorious appeals from Rule 11 sanctions, particularly in cases in which the sanction is imposed against counsel. As both the Chicago Council of Lawyers and Petitioner recognized in their briefs, the collateral consequences to a lawyer of a Rule 11 sanction are sufficiently great that he will virtually always appeal from such an award, regardless of its size. The real danger is that victims of Rule 11 violations would be discouraged from seeking Rule 11 sanctions against the offending attorney in the absence of a rule permitting the award of appellate attorney fees, because such victims would quickly recognize that any award could easily be dwarfed by the nonreimbursable costs of defending that award.

As the brief of Public Citizen recognized, where prevailing parties to a lawsuit are permitted by statute to recover attorney fees, courts have held that they are also entitled to recover attorney fees expended in defending their fee awards on appeal. Brief of Public Citizen at 17. In the absence of such a rule, any recovery at the trial court level could easily be devoured by appellate costs. WLF submits that the same considerations that dictate recovery of appellate fees in cases involving fee-shifting statutes dictate that Respondents should have an opportunity to recover their appellate costs in this case.

CONCLUSION

For the foregoing reasons, *amicus* Washington Legal Foundation respectfully requests that the Court

affirm the decision of the court of appeals and remand the case to the district court for a determination regarding an appropriate award of appellate attorney fees as an additional Rule 11 sanction.

Respectfully submitted,

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